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### Cover Page Footnote

Visting Assistant Professor of Law, Duke University School of Law. J.D., New York University School of Law, 2003; Ph.D., Northwestern University, 2004. The author wishes to thank Richard Kraut, Thomas McCarthy, Ronald Dworkin, Thomas Nagel, Alex Boraine, Paul van Zyl, Mark Sheldon, Sara Beale, James Boyle, Doriane Lambelet Coleman, James Coleman, Madeline Morris, Jedediah Purdy, Richard Schmalbeck, and Neil Siegel for their comments on this Article in various prior forms. Debts of gratitude also are owed to Pablo De Greiff for his time and insight, Judge Charles S. Haight, Jr., and Judge Chester J. Straub for their mentorship and advice, and Bill Nelson, Barry Friedman, Katharine Bartlett, and Stuart Benjamin for their support and assistance.

# AN EXCUSE-CENTERED APPROACH TO TRANSITIONAL JUSTICE

David Gray\*

## INTRODUCTION

Recently, we have been witness to a tsunami. This “third wave” of liberal revolutions in Asia, Europe, Africa, and South America has begun to melt away the last frozen remnants of the Cold War.<sup>1</sup> In the wake of these revolutions, as nations and states make the transition to democracy, the following question arises: “What is to be done about past wrongs?”<sup>2</sup>

Transitional regimes, in contrast to their autocratic and abusive predecessors, are committed to human rights, democracy, and the rule of law. To make good on these commitments, new states must seek justice for victims and abusers. Given that “justice” is traditionally understood in terms of those well-worn coins<sup>3</sup> “responsibility,” “crime,” and “punishment,” it is no surprise that criminal trials and punishments are often the standard for justice in transitions.<sup>4</sup> Unfortunately, traditional theories of criminal jurisprudence have been developed in relatively stable

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1. See generally Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1991).

2. Contemporary conversations about transitional justice owe everything to a debate in print between Professors Diane Orentlicher and Carlos Nino published in the *Yale Law Journal*. Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 *Yale L.J.* 2619 (1991); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale L.J.* 2537 (1991) [hereinafter Orentlicher, *Settling Accounts*]; see Diane F. Orentlicher, *A Reply to Professor Nino*, 100 *Yale L.J.* 2641 (1991).

3. I allude to an image of truth adopted by philosopher Jacques Derrida from Friedrich Nietzsche. See Friedrich W. Nietzsche, *On Truth and Lies in a Nonmoral Sense*, in *Philosophy and Truth: Selections from Nietzsche's Notebooks of the Early 1870's*, at 79, 92 (Daniel Breazeale trans. & ed., 1979).

4. Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 *Harv. Hum. Rts. J.* 39, 40 (2002).

states where the ideal is within the reach of aspiration.<sup>5</sup> Alluding to philosopher John Rawls, author Pablo De Greiff has distinguished transitions as "very imperfect world[s]." <sup>6</sup> De Greiff notes that efforts to seek justice in transitions face practical challenges that do not disturb views from crystalline castles.<sup>7</sup> These considerations usually lead transitions to pursue "hybrid" programs of justice composed of limited prosecutions focused on top leaders,<sup>8</sup> official or de facto amnesties, truth commissions, lustration, and reparations.<sup>9</sup>

In transitions, and in transitional justice literature, hybrid programs usually are compromises born of necessity.<sup>10</sup> Transitional regimes admit that it would be better to prosecute all persons who had a hand in past abuses, but recognize that this is simply not possible.<sup>11</sup> Transitions must settle for the best justice possible given imperfect circumstances.<sup>12</sup> Some have characterized the sighs that accompany this view as hysterical overreaction, mistaking the practical challenges to justice in transitions for insurmountable obstacles rather than simple variations of challenges confronted by "ordinary justice."<sup>13</sup> There are, in fact, few if any handwringers among those interested in transitional justice. It is true that faced with the compromises borne of necessity most transitional justice theorists express understandable regret that "more" justice cannot be done,<sup>14</sup> but regretting that more cannot be done is not the same as giving up on justice entirely.<sup>15</sup>

This Article charts a different course: It proposes a transitional jurisprudence that, though nonideal, is decidedly positive. It argues that the unique scale of practical challenges to transitional justice present

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5. Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 J. Int'l Aff. 647, 661 (1999).

6. Pablo De Greiff, *International Courts and Transitions to Democracy*, 12 Pub. Aff. Q. 79, 79 (1998); see also Bruce Ackerman, *The Future of Liberal Revolution* 74-75 (1992).

7. See Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 Harv. L. Rev. 761, 777-825 (2004).

8. Orentlicher, *Settling Accounts*, *supra* note 2, at 2602-04.

9. Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in *Truth v. Justice: The Morality of Truth Commissions* 3, 7 (Robert I. Rotberg & Dennis Thompson eds., 2000).

10. See *id.*

11. See van Zyl, *supra* note 5, at 661.

12. See Michel Rosenfeld, *Restitution, Retribution, Political Justice and the Rule of Law*, 2 Constellations 309, 310 (1996).

13. See generally Posner & Vermeule, *supra* note 7. Sweeping aside the madness, Professors Eric Posner and Adrienne Vermeule characterize challenges to justice in transition as differing from the humdrum problems faced by stable states only in terms of scale. Transitional justice is just "ordinary justice." The corresponding advice to transitional justice practitioners is to grin and bear it. That is slim comfort. More important, it ignores the distinctive conditions of abusive regimes that are bound to problems of scale, which, when properly accounted for, provide significant guidance for a transitional jurisprudence.

14. See Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in *Truth v. Justice: The Morality of Truth Commissions*, *supra* note 9, at 235, 237-40.

15. See *id.* at 240.

jurisprudential problems that are not satisfied by treating transitional justice as ordinary justice.<sup>16</sup> In particular, this Article emphasizes the importance of recognizing that pre-transitional states are not simply crime ridden, occupied by awesome numbers of entrepreneurial and independent criminals. Rather, an abusive regime is defined by social norms, a particular ontology, and a historical teleology that, operating through official state agents, construct a public face of law that sanctions and organizes violence perpetrated by institutional actors and private citizens.<sup>17</sup> This approach appreciates that settling for the “best justice possible” leaves transitional justice theorists and practitioners understandably dissatisfied.<sup>18</sup> Contrary to the “ordinary justice” approach, however, it contends that this discomfort is symptomatic of attempts to shoehorn stable-state justice theories into transitions while failing to appreciate that defining features of transitions and pre-transitional abuses have normative significance.<sup>19</sup>

Transitional justice is an exercise in “nonideal” theory.<sup>20</sup> As such, it must take positive account of the unique circumstances found in transitions and their predecessor regimes in constructing a transitional jurisprudence.<sup>21</sup> By examining the unique conditions in societies capable of mass and institutionalized atrocities, this Article argues that most of those implicated in past wrongs should qualify for an affirmative legal excuse. Further, it

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16. Ruti G. Teitel, *Transitional Justice* 3 (2000) (arguing that transitional justice is a function of the unique political dynamics and democratic goals of transitions to democracy).

17. See Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* 21 (1996); Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories From Rwanda* 96, 115 (1998); Aukerman, *supra* note 4, at 59. The content and role of the public face of law in abusive regimes is discussed at greater length in Part II. For the present, it is sufficient to point out that laws on the books have no meaning independent of prevalent socio-normative commitments. The content and meaning of a law against murder, for example, depends on a social ontology that describes the extension of “human” or “person.” A defining feature of abusive regimes is that, in light of dominate socio-ontological categories, laws on the books provide protection for some classes but not for others—those targeted for abuse cannot be “murdered” because they are subhuman. See Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *On Human Rights* 111, 112-15 (Stephen Shute & Susan Hurley eds., 1993).

18. Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, in *Truth v. Justice: The Morality of Truth Commissions*, *supra* note 9, at 22, 27 (pointing out that limited prosecutions entail “political decision[s] with moral implications”).

19. See Frederick Schauer, *Legal Development and the Problem of Systemic Transition*, 13 *J. Contemp. Legal Issues* 261, 261-66 (2003) (discussing various scales of “transition,” and recognizing that massive systemic shifts on the scale that revolutions present are unique practical and normative challenges).

20. John Rawls, *The Law of Peoples* 5, 106-13 (1999). Transitional regimes are heir to what philosopher John Rawls would call “unfavorable conditions,” which, as he might argue, set normative limitations on justice in transitions.

21. While transitional justice literature is rife with descriptive efforts documenting these unique conditions, this Article occupies a unique position in trying to take normative account of the defining features of transitions. See Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, at xi, 79-80 (2004) (assuming a decidedly descriptive approach to transitional justice and refraining from a normative conclusion). *But see* Posner & Vermeule, *supra* note 7, at 763-65 (arguing that the conditions of transitions are neither unique nor demanding of a unique normative analysis).

describes how centering transitional justice programs on the proper provision of such an excuse justifies hybrid programs composed of vertically limited trials, truth commissions, and reparations as the best, not just the best possible, justice in transitions.<sup>22</sup>

The excuse-centered approach advanced in this Article depends on the sustainability of this excuse. This Article focuses on that task. Part I details the "justice gap" that is the defining concern of transitional justice. Part II explores the normative significance of this gap, arguing that mass atrocities necessarily are correlated with a public face of law that provides abusers, in their roles as public agents, warrant for believing that their acts are right, necessary, or at least not subject to punishment. Given this, Part II concludes that, with the exception of high-level leaders, most of those living under an abusive public face of law should qualify for an affirmative excuse based on the legality principal. Parts III and IV defend the proposed excuse against challenges from deontological and consequentialist legal theories respectively. Part V provides a sketch of how the excuse, placed at the center of a transitional justice program, provides both justification and practical guidance for truth commissions. While a full defense of truth commissions is beyond the scope of this Article, Part V also indicates how the proposed approach solves some of the most pernicious challenges to truth commissions and "restorative justice."<sup>23</sup>

#### I. THE JUSTICE GAP: PRACTICAL LIMITS ON CRIMINAL TRIALS IN TRANSITIONS

Among the most striking features of *ancién regimes*<sup>24</sup> are widespread complicity and broad participation in abuses.<sup>25</sup> Political leaders, military personnel, executive officials, and police are among the most notorious culprits,<sup>26</sup> but they only mark the surface. Innumerable acts of unofficial violence, petty abuse, and discrimination characterize abusive regimes.<sup>27</sup> The histories of these regimes are punctuated by murderous rampages

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22. This argument has not been made sufficiently in the literature on transitional justice, but it is necessary for a satisfying transitional jurisprudence. See Gutmann & Thompson, *supra* note 18, at 26-27; Orentlicher, *Settling Accounts*, *supra* note 2 at 2603.

23. See generally Desmond Mpilo Tutu, *No Future Without Forgiveness* (1999); Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in Truth v. Justice: The Morality of Truth Commissions, *supra* note 9, at 68; Jennifer Llewelyn, *Justice for South Africa: Restorative Justice and the South African Truth and Reconciliation Commission*, in *Moral Issues in Global Perspective* 96 (Christine Koggel ed., 1999).

24. I take the term *ancién regimes* from Professor Ruti Teitel, who uses it throughout *Transitional Justice*. Teitel, *supra* note 16. In addition, I refer to these regimes variously as "predecessor regimes," "pre-transitional regimes," and "abusive regimes."

25. See José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in 1 *Transitional Justice* 3, 13 (Neil J. Kritz ed., 1995).

26. See Goldhagen, *supra* note 17, at 164-78.

27. See *id.*

perpetrated by erstwhile spouses, friends, and neighbors.<sup>28</sup> These acts and events themselves are girded and sustained by pervasive public sentiments that provide support for abuses.<sup>29</sup> Members of the international community frequently fail to intervene.<sup>30</sup> Corporate interests profit from abusive regimes and the victimization of subjugated groups.<sup>31</sup> In some cases victims are complicit in the abuse of others.<sup>32</sup> When it is time to assign responsibility, tens of thousands have a share.<sup>33</sup>

Despite the incredible demands for justice, transitional governments face severe limitations on their capacity to carry out criminal prosecutions.<sup>34</sup> One of the most significant limitations is the restricted availability of professional and bureaucratic resources.<sup>35</sup> There simply are not enough judges, prosecutors, police, and other officials to meet demands and provide adequate due process.<sup>36</sup> Ad hoc and permanent international tribunals that attempt to provide additional resources have proven woefully slow and incapable of making an appreciable dent in the demand.<sup>37</sup>

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28. This was true in Rwanda, see Gourevitch, *supra* note 17, and in Macedonia. See Julius Strauss & Christian Jennings, *Spectre of Ethnic Cleansing Resurrected*, Daily Telegraph (London), June 27, 2001, at 13.

29. See Goldhagen, *supra* note 17, at 27-163, 416-54; Gourevitch, *supra* note 17, at 47-62, 96-131; Kosovo Report: Conflict, International Response, Lessons Learned 33-64 (2000); Jaime Malamud-Goti, *Game Without End: State Terror and the Politics of Justice*, 29-99 (1996); Carlos S. Nino, *Radical Evil on Trial* 41-60 (1996); Samantha Power, "A Problem from Hell": America and the Age of Genocide (2002); Rorty, *supra* note 17, at 112-15.

30. Power, *supra* note 29, at 37 (quoting the suicide note of Jewish activist Szmul Zygielbojm).

31. The alleged complicity of Exxon-Mobil in abuses perpetrated along its Indonesian oil pipeline provides a recent example. See Indonesia—Oil and Mining Projects Threaten Communities in Aceh and Papua, <http://www.amnestyusa.org/business/environment/indonesia.html> (providing background) (last visited Mar. 20, 2006). Corporate profiteering from Nazi crimes was also notorious. Justice has been sought and awarded from some of these entities. See generally John Authers & Richard Wolffe, *The Victim's Fortune: Inside the Epic Battle over the Debts of the Holocaust* (2002); Madeline Doms, *Compensation for Survivors of Slave and Forced Labor: The Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Survivors*, 14 *Transnat'l Law.* 171 (2001); International Labor Rights Fund, <http://www.laborrights.org/> (last updated Mar. 3, 2006) (documenting federal litigation against Exxon brought by the International Labor Rights Fund on behalf of Aceh victims).

32. Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* 128 (2000); *Dealing with the Past: Truth and Reconciliation in South Africa* 2-8 (Alex Boraine et al. eds., 1994) (remarks of Aryeh Neier); Elster, *supra* note 21, at 152-53.

33. See Huntington, *supra* note 1, at 214 (quoting Vaclav Havel, *New Year's Address*, 3 *Uncaptive Minds*, Jan.-Feb. 1999, at 2); Malamud-Goti, *supra* note 30, at 22-26.

34. Elster, *supra* note 21, at 208-11; Schauer, *supra* note 19, at 270-73.

35. Posner & Vermeule, *supra* note 7, at 777-79.

36. Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* 45 (1998).

37. The International Criminal Tribunal for Rwanda ("ICTR"), for example, has been in operation for over ten years but, as of this writing, has tried to judgment only twenty-two cases. See International Criminal Tribunal for Rwanda, <http://65.18.216.88/default.htm> (last visited Feb. 28, 2006). This does not constitute a strong objection to the existence of these tribunals, whose most important contributions are to international criminal jurisprudence.

Transitions also must face the reality that many of those who could carry out criminal trials are tainted by the past.<sup>38</sup> If these officials are forced to step down there are even fewer prosecutors, judges, clerks, jailers, investigators, and defense attorneys available to conduct prosecutions.<sup>39</sup> But if tainted officials are left in place transitions must be concerned that former agents of abuse cannot be relied upon to blame their cohorts, much less themselves.<sup>40</sup> Thus, beyond straightforward supply issues, transitions face questions about quality and potential conflicts of interest that compromise their ability to prosecute.<sup>41</sup>

Transitions also have limited material resources.<sup>42</sup> Economic reform, infrastructure, democratization, social programs, and myriad other needs make claims that exceed the resources of a new nation.<sup>43</sup> More often than not these needs far outstrip the resources of a new nation even without competition from criminal prosecutions.<sup>44</sup> In addition, transitional regimes have a limited fund of moral capital and public support.<sup>45</sup> The citizenry of a new state is seldom uniform in its support of a transitional regime.<sup>46</sup> Many will be concerned about the direction taken in transition.<sup>47</sup> There also may be significant skepticism about the moral standing of those charged with carrying out transitional programs.<sup>48</sup> Finally, a people exhausted by years of oppression and revolution may not have the energy to sustain long public prosecutions, particularly if it means delaying other transitional projects.<sup>49</sup> In this narrow window of opportunity transitions must consider where and how to spend precious resources. Efforts to address past wrongs should not be pursued at the expense of other transitional goals if the trade-off threatens the success of transition itself.<sup>50</sup>

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These numbers are meant only to emphasize the impossibility of prosecuting, with full protection of process, all those implicated in pre-transitional abuses.

38. Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* 89 (2001); Luc Huyse, *Justice After Transitions: On the Choices Successor Elites Make in Dealing with the Past*, in 1 *Transitional Justice*, *supra* note 25, at 104, 109; Schauer, *supra* note 19, at 270-72.

39. Stanley A. Roberts, Note, *Socio-Religious Obstacles to Judicial Reconstruction in Post-Saddam Iraq*, 33 *Hofstra L. Rev.* 367, 389-90 (2004).

40. *See id.* at 388-89.

41. *See Ackerman, supra* note 6, at 72, 74-75.

42. *Id.*

43. *See Zalaquett, supra* note 25, at 20.

44. Elster, *supra* note 21, at 208-15.

45. *See Ackerman, supra* note 6, at 72; David Pion-Berlin, *To Prosecute or to Pardon?: Human Rights Decisions in the Latin American Southern Cone*, in 1 *Transitional Justice*, *supra* note 25, at 82, 82-83.

46. *See* Juan J. Linz, *The Breakdown of Democratic Regimes: Crisis, Breakdown, and Reequilibration*, in 1 *Transitional Justice*, *supra* note 25, at 123, 127-28.

47. *Id.*

48. *Cf. Ackerman, supra* note 6, at 72 (pointing out that bureaucratic officials upon whom the success of reforms may depend may be suspect in light of their connections to the old regime).

49. *See id.* at 69-81 (discussing the practical and political limitations on efforts to seek corrective justice in transitions).

50. De Greiff, *supra* note 6, at 81.



The practical limitations on justice in transitions translate into a number of theoretical problems. First, procedural justice, a necessary corollary of the rule of law, frequently is compromised.<sup>51</sup> In transitional circumstances opportunities for vengeance abound and extrajudicial punishment, including execution, is common,<sup>52</sup> particularly when justice is left in the hands of those without professional training or political accountability.<sup>53</sup> Due process rights are threatened as those arrested wait to be charged, wait for assistance of counsel, and wait (for years) to get their day in court.<sup>54</sup> Such results threaten the moral and political standing of transitions by compromising commitments to the rule of law.

Second, equal distribution of justice is compromised. Because not every individual implicated in past abuses can be tried all prosecutions will be selective.<sup>55</sup> If necessity drives the selections it is unlikely that choices will be made on principle.<sup>56</sup> Ad hoc distinctions and novel post facto rules breach transitional commitments to democracy and the rule of law<sup>57</sup> while simultaneously threatening to put the new regime in the same moral position as its predecessor.<sup>58</sup> The results of these selections are also frequently counterintuitive. Underlings are tried and punished while high-level leaders escape prosecution, often by exploiting the fruits of their abuses.<sup>59</sup> Thus, limitations on resources result in both too many and too few being punished, and, of those who are punished, their punishment is often either too severe or not severe enough.

Third, if criminal punishment is the standard then justice will not be served in transitions. Transitions cannot prosecute all wrongdoers.<sup>60</sup> As a result many if not most of the guilty will escape punishment, including many of those most responsible.<sup>61</sup> This circumstantial parsimony implies that those who are not prosecuted are innocent of any wrongdoing and that their victims have suffered no wrong.<sup>62</sup>

51. Elster, *supra* note 21, at 88, 235-40 (discussing the tension between procedural and substantive justice and recommending ways to solve the dilemma).

52. *Id.* at 97-99.

53. *Id.*

54. This is even true in the "more ideal" circumstances of the ad hoc criminal tribunals. See Barayagwiza v. Prosecutor, Case No. ICTR 97-19, Decision of the Appeals Chamber (Nov. 3, 1999) (releasing defendant for speedy trial violations).

55. Elster, *supra* note 21, at 208-15; Hayner, *supra* note 38, at 12; Minow, *supra* note 36, at 31, 40-47; Gutmann & Thompson, *supra* note 18, at 26-27; van Zyl, *supra* note 5, at 666.

56. Minow, *supra* note 36, at 31, 40-44.

57. Martin P. Golding, *Retroactive Legislation and Restoration of the Rule of Law*, 1 Ann. Rev. L. & Ethics 169, 170-74 (1993); see also Elster, *supra* note 21, at 83, 235-40.

58. Elster, *supra* note 21, at 83; see Lon L. Fuller, *The Morality of Law* 39, 248-49 (1969) (describing this concern and giving it voice in the context of the parable of the Purple Shirts).

59. James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 Fordham Int'l L.J. 616, 641-42 (2005).

60. Aukerman, *supra* note 4, at 51-53.

61. De Greiff, *supra* note 6, at 81-82; Kiss, *supra* note 23, at 68.

62. Pablo De Greiff, *Trial and Punishment: Pardon and Oblivion*, Phil. & Soc. Crit., May 1996, at 93, 105.

Finally, selective prosecutions address only some wrongs, some wrongdoers, and some victims. They fail to establish a complete and publicly legitimate account of the past.<sup>63</sup> This failure denies justice to victims whose suffering is never made part of the record.<sup>64</sup> Moreover, the nature of the truth established in a criminal trial is limited by the purposes of the trial—to establish the guilt or innocence of particular individuals charged with particular acts—as well as by rules of evidence and other formalities.<sup>65</sup> This limited truth<sup>66</sup> opens the door for revisionism and potential backlash by failing to meet the transitional need for a full, historical, and politically legitimate account of the past.<sup>67</sup>

The justice gap that opens in transitions is filled most frequently with alternative theories of justice, such as restorative justice,<sup>68</sup> and alternative procedures, such as truth commissions.<sup>69</sup> As products of necessity, however, these efforts often appear as no more than accommodations that provide the best justice possible given imperfect circumstances in transitions.<sup>70</sup> This is deeply dissatisfying for both practitioners and theorists. A valid and usable theory of transitional justice must take normative account of these practical concerns, not simply accommodate them. Given that prosecutions in transitions can never be complete, a nonideal theory of transitional justice must propose a way to make prosecutorial selections rational;<sup>71</sup> it must provide a morally sustainable justification for the parsimony implied by selectivity;<sup>72</sup> and it must promise that transitions can accomplish these goals within the limitations presented by their circumstances. Rationalizing transitional justice programs as the best justice possible is inadequate.<sup>73</sup>

This Article argues for a transitional justice program centered on prosecutorial selections made according to an affirmative defense based on

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63. See 1 Truth and Reconciliation Commission of South Africa Report, ch. 1, ¶¶ 7, 24, ch. 5, ¶¶ 71, 73 (1999).

64. See Minow, *supra* note 14, at 235; Rotberg, *supra* note 9, at 3 (discussing the role of truth commissions in coming to terms with brutal pasts).

65. Hayner, *supra* note 38, at 100-02; Gutmann & Thompson, *supra* note 18 at 40-41.

66. Minow, *supra* note 36, at 47, 60.

67. Van Zyl, *supra* note 5, at 658-61, 667.

68. The concept of "restorative" justice is a topic of significant discussion in the literature on transitional justice. See, e.g. Kiss, *supra* note 23, at 68-93; Llewellyn, *supra* note 23, at 103-07. Restorative justice has also increasingly become a topic of interest for stable state theorists. See, e.g., Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 1 Utah L. Rev. 413 (2003). This literature builds on earlier work done on rehabilitative and educative justice more generally. See, e.g., Jean Hampton, *The Moral Education Theory of Punishment*, 13 Phil. & Pub. Aff. 208 (1984).

69. Author Priscilla B. Hayner provided the first survey of contemporary truth commissions in *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 Hum. Rts. Q. 597 (1994). She expanded and deepened her study in *Unspeakable Truths: Confronting State Terror and Atrocity* (2001).

70. Gutmann & Thompson, *supra* note 18, at 25-26.

71. De Greiff, *supra* note 6, at 81-82.

72. See *id.*

73. Posner and Vermeule argue the contrary. See Posner & Vermeule, *supra* note 7, at 825.

the legality principle. This excuse-centered approach offers a rational justification for exercising selectivity in transitions and provides guidance and justification for other features of transitional justice programs.

## II. THE NORMATIVE SIGNIFICANCE OF PRACTICAL CONCERNS

Treating broad complicity as a practical limitation on trials in transitions begs a critical question confronting transitional movements: How could so many join to perpetrate atrocities? This part contends that mass atrocities are in part a function of social and legal norms. Absent a socio-legal environment that supports abuse, abuses on the scale confronted by transitions would not occur. Thus, it is argued, most of those who participated in pre-transitional abuses should be excused from prosecution.

### A. *The Role of an Abusive Public Face of Law in Abusive Regimes*

Who doubts that the Argentine or Chilean murderers of people who opposed the recent authoritarian regimes thought that their victims deserved to die? Who doubts that the Tutsis who slaughtered Hutus in Burundi or the Hutus who slaughtered Tutsis in Rwanda, that one Lebanese militia which slaughtered the civilian supporters of another, that the Serbs who have killed Croats or Bosnian Muslims, did so out of conviction in the justice of their actions? Why do we not believe the same for the German perpetrators?<sup>74</sup>

—Daniel Goldhagen

Genocide, after all, is an exercise in community building.<sup>75</sup>

—Philip Gourevitch

Mass atrocities on a scale necessitating programs of transitional justice are not phenomena of happenstance in which thousands of agents independently and simultaneously decide to murder their neighbors.<sup>76</sup> The scale, breadth, and duration of these abuses demonstrate that there is something distinctive about the targeted violence committed by and under abusive regimes.<sup>77</sup> Particularly salient is the role played by law, social norms, and publicly circulated, officially sanctioned, beliefs,<sup>78</sup> collectively “the public face of law.”<sup>79</sup>

74. Goldhagen, *supra* note 17, at 14-15.

75. Gourevitch, *supra* note 17, at 95.

76. See Goldhagen, *supra* note 17, at 15-16 (noting that perpetrators were working in prescribed roles).

77. See van Zyl, *supra* note 5, at 661-62.

78. These include a social ontology and a historical teleology. See, e.g., Goldhagen, *supra* note 17, at 27-163; Gourevitch, *supra* note 17, at 47-62, 96-131; Malamud-Goti, *supra* note 29, at 71-99; Nino, *supra* note 29, at 41-60; Rorty, *supra* note 17, at 112-15. Social ontologies are normalized typologies in which individuals are typed and situated hierarchically. Teleologies provide abusive regimes with an account of the current conflict in a broader historical context. Referring to this background, abusive regimes solve current disorder by devising and executing strategies designed to make the real world better

When examining the Nazi Holocaust or any number of genocides before and since it is tempting to think that only evil, irrational, or savage people could perpetrate horrific acts on such a terrible scale.<sup>80</sup> Normal people, people like us, could never do what they did—at least not willingly.<sup>81</sup> This intuition, while comforting, obscures an essential feature of mass violence: The greatest of evils is perpetrated not by devils<sup>82</sup> but by and with the support of average citizens.<sup>83</sup> Genocide and other mass atrocities simply could not occur without the participation and aid of “willing executioners.”<sup>84</sup>

Many of those implicated in mass violence were not so willing, of course.<sup>85</sup> Duress is a frequent tool of abusive regimes,<sup>86</sup> and those faced with a kill or be killed ultimatum cannot, by definition, be described as willing.<sup>87</sup> Those manipulated by combinations of drugs, brainwashing, and threats (including the child soldiers<sup>88</sup> who have been implicated in abuses committed in Sierra Leone,<sup>89</sup> Liberia,<sup>90</sup> the Ivory Coast, Uganda,<sup>91</sup> Congo, and Columbia<sup>92</sup>) also do not fit neatly into the category of willing executioners.<sup>93</sup> In all abusive regimes there also are those who actively oppose, protest, and work to prevent atrocities.<sup>94</sup> Abusive regimes are, in short, far from homogenous. Even taking into account these complexities, it remains the case that institutionalized atrocities require the support of

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approximate their ideal end of history. This “final solution” often means eliminating entirely the target group.

79. Teitel, *supra* note 16, at 18-20.

80. Rorty, *supra* note 17, at 112-15.

81. Goldhagen, *supra* note 17, at 14.

82. I use this word conscious of, but distinct from, its Kantian meaning. See Immanuel Kant, *Perpetual Peace* 24-32 (Lewis White Beck ed., Liberal Arts Press 1957) (1795). My argument in this Article centers on the proposition that mass atrocities are perpetrated by members of the human race, Immanuel Kant’s “race of devils,” who, having failed to bind their actions to the demands of moral right, are subjects of law. I, however, do not propose to forgive the moral lapses of pre-transitional abusers any more than Kant forgives those who fail to do their moral duty. Devils are devils still, no matter the ineffectiveness of a devil’s solution.

83. See Goldhagen, *supra* note 17, at 164-65; Gourevitch, *supra* note 17, at 115; see also Rorty, *supra* note 17, at 112-15.

84. I take this phrase from author Daniel Jonah Goldhagen, *supra* note 17.

85. See Minow, *supra* note 36, at 35-36.

86. *Id.*; see Gourevitch, *supra* note 17, at 96, 249.

87. Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 *Am. U. Int’l L. Rev.* 1131, 1162-63 (2002).

88. See generally Rachel Brett & Margaret McCallin, *Children: The Invisible Soldiers* (2d ed. 1998).

89. Norimitsu Onishi, *Children of War in Sierra Leone Try to Start Over*, *N.Y. Times*, May 9, 2002, at A14.

90. Human Rights Watch, *How to Fight, How to Kill: Child Soldiers in Liberia* (2004), available at <http://www.hrw.org/reports/2004/liberia0204>.

91. Human Rights Watch, *Stolen Children: Abduction and Recruitment in Northern Uganda* (2003), available at <http://www.hrw.org/reports/2003/uganda0303>.

92. Human Rights Watch, “You’ll Learn Not to Cry”: Child Combatants in Colombia (2003), available at <http://www.hrw.org/reports/2003/colombia0903>.

93. Happold, *supra* note 87, at 1138, 1158-65.

94. Elster, *supra* note 21, at 99.

participants, passive supporters, opportunistic profiteers, and those who indulge in naïve denial.<sup>95</sup> While we may applaud the heroes we are left to wonder how so many were led to such madness. Answering this question requires taking seriously the possibility that the practical realities of scale and complicity that distinguish abusive regimes are not merely differences in magnitude, as compared to the everyday problems that face “ordinary justice,”<sup>96</sup> but rather serve as markers for unique social conditions that carry normative force, making it impossible to simply dismiss transitional justice as a special case of everyday justice.

In stable states there is a close identification between norms and the norm.<sup>97</sup> Wrongs, as crimes, are the exception, perpetrated in violation of established and regularly enforced legal codes. By contrast, in abusive regimes targeted abuse is the norm.<sup>98</sup> Widespread abuses are institutional tools of pre-transitional states.<sup>99</sup> In *ancién regimes*, black-letter law frequently fails to condemn, and instead supports or even demands acts of abuse.<sup>100</sup> Executive and judicial agents participate in these activities, either directly or by sustaining an environment in which murder and other abuses can flourish.<sup>101</sup> Police and the military join local officials in organizing and perpetrating offenses in the name of the state.<sup>102</sup> Other public personalities organize programs of systematic discrimination.<sup>103</sup> These official acts form

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95. Frau Maria, mother of the repentant soldier in author Simon Wiesenthal's famous essay “The Sunflower,” is the paradigmatic example for this class. Simon Wiesenthal, *The Sunflower: On the Possibilities and Limits of Forgiveness* 84-94 (1997).

96. See Posner & Vermeule, *supra* note 7, at 777-825 (suggesting that the distinctive dilemmas of transitional justice are overblown versions of ordinary legal problems).

97. Van Zyl, *supra* note 5, at 661.

98. *Cf. id.* at 660-61 (describing the prevalence and legality of political killings in Apartheid South Africa).

99. See Rajeev Bhargava, *Restoring Decency to Barbaric Societies*, in *Truth v. Justice: The Morality of Truth Commissions*, *supra* note 9, at 45, 45-50. This “symmetric barbarity” is what Professor Rajeev Bhargava contends distinguishes pre-transitional regimes that are appropriate subjects of transitional justice from programs of abuse carried out by a few perpetrators without the popular knowledge or support of society and social institutions. *See id.*

100. See Gourevitch, *supra* note 17, at 96, 123 (describing how killing Tutsis was effectively the law in Rwanda during the 1994 genocide); see Nunca Más: The Report of the Argentina National Commission on the Disappeared 442 pt. V (1984), available at [http://www.nuncamas.org/english/library/nevagain/nevagain\\_001.htm](http://www.nuncamas.org/english/library/nevagain/nevagain_001.htm) (last visited Feb. 26, 2006) [hereinafter *Nunca Más: Part V*] (providing extensive documentation of the role played by the fight against communism in the minds, policies, and actions of those who fought in Argentina's “Dirty War”); see also Raul Hilberg, *The Destruction of the European Jews* 62-63 (1961) (discussing the compulsory boycott of Jewish-owned businesses in Nazi Germany).

101. The Nazi regime presents, perhaps, the most pernicious example of official participation in abuse. *See, e.g.*, Eugene Davidson, *The Trial of the Germans* 7 (1966); Goldhagen, *supra* note 17, at 97; Simon Wiesenthal, *Every Day Remembrance Day* 11-28 (1987). But some level of public support is a ubiquitous and necessary condition of the mass violence that precedes transitional movements, presenting the need for systemic reform.

102. Alan S. Rosenbaum, *Prosecuting Nazi War Criminals* 11-12 (1993).

103. Hilberg, *supra* note 100, at 4-6 (describing how canonical law affected Jews in Italy during the Holocaust).

part of a public face of law that provides license for the events that cry out for justice in transition. In recognition of the role played by the public face of law in abusive regimes, transitions count among their highest goals sponsoring personal and institutional reforms committed to democratic ideals, human rights, and the rule of law.<sup>104</sup>

Composed of these elements the public face of law is not the same as black-letter law. In some regimes black-letter law requires abuse. This is not always the case, however. In many regimes laws on the books prohibit murder, rape, and other acts of violence.<sup>105</sup> Unfortunately, "in transitional periods, there is commonly a large gap between the law as written and as it is perceived."<sup>106</sup> This perception gap, which reflects the reality of what law is in abusive regimes, is regulated by social and institutional elements of the public face of law, which affect perceptions of what is and is not prohibited,<sup>107</sup> and, perhaps more importantly, who is and who is not deserving of legal protection.<sup>108</sup> So, while there were laws on the books against assault and murder in antebellum slave states, they did not provide effective protection for slaves, who were considered chattel.<sup>109</sup> Similarly, in abusive regimes the targeting of certain classes of victims is sanctioned by prevailing beliefs regarding who is and who is not included in the class of beings who enjoy the protections afforded by laws against murder, rape, and assault.

Mass atrocities are not a coincidental collection of independent acts. Large-scale abuses happen for a reason.<sup>110</sup> In pre-transitional regimes, the institutions that organize abuse reflect a deeper social ethos, a historical ontology, and a narrative truth that present abusive practices as rational or, in some cases, necessary.<sup>111</sup> The Nazi Holocaust provides a stark example.

104. See Elster, *supra* note 21, at 83; Teitel, *supra* note 16, at 29.

105. Sanford Levinson, *Trials, Commissions, and Investigating Committees: The Elusive Search for Norms of Due Process*, in Truth v. Justice: The Morality of Truth Commissions, *supra* note 9, at 211, 219.

106. Teitel, *supra* note 16, at 19.

107. *Id.* at 18-20.

108. Abusive regimes frequently justify abuses by reclassifying victims such that they cannot be "murdered" or "raped." See Rorty, *supra* note 17, at 112-14.

109. See Omar Swartz, *Codifying the Law of Slavery in North Carolina: Positive Law and the Slave Persona*, 29 T. Marshall L. Rev. 285, 291-300 (2004) (discussing failed prosecutions of slave owners for assault and murder). The same cannot be said of lynch mobs in the American South during the 1920s. As is emphasized in Parts III and IV of this Article, there is no excuse for those who cling to social beliefs rejected in transition. The Reconstruction Amendments, in combination with federal criminal codes, made clear to all Americans the inherent evil of the social ontology that categorized those of African and Caribbean heritage as chattel rather than citizens deserving of full legal protection.

110. Gourevitch, *supra* note 17, at 180 (listing the factors that led to genocide in Rwanda). The point that atrocities happen for a reason should not be confused with cultural or social determinism. Certain social conditions are necessary for mass atrocities. Social mores are incapable of acting alone, however, and just as individual choices and actions are necessary to produce atrocities so are individual moral failures. See Goldhagen, *supra* note 17, at 20-22. As I argue below, these moral failures cannot be subject to legal punishment.

111. Goldhagen, *supra* note 17, at 3-24, 49-50; Wiesenthal, *supra* note 101, at 15.

Nazi crimes, and the support provided by ordinary Germans during the Holocaust, were sponsored by an "eliminationist anti-Semitism"<sup>112</sup> that foretold a complete eradication of European Jews.<sup>113</sup> Public norms and an officially sanctioned public face of law, disseminated and enforced by bureaucratic, executive, and military agents, played a critical role in the targeting of Jews and Gypsies for death in Nazi-occupied Europe from 1935 to 1945.<sup>114</sup> From the first experiments with violence preceding the passage of the Nuremberg Laws to *Kristallnacht* to the full-scale mechanized murders perpetrated in concentration camps, the Nazi's killing of Jews was consistent with a publicly circulated view that Jews must be eliminated.<sup>115</sup>

The Nazis are not alone in drawing on historical teleology and social ontology to guide and justify mass atrocity.<sup>116</sup> Philosopher Richard Rorty points out that a dehumanizing ontology, in combination with a historical ontology, was at the center of atrocities perpetrated in Bosnia, where abusers did not see themselves as committing offenses because they did not view their victims as humans.<sup>117</sup> In a chilling account of the Rwandan massacre, Philip Gourevitch explains that the bodies washing up on the shores of Lake Kivu and Lake Victoria were sent to Ethiopia at the direction of Hutu authorities as an expression of a historical ontology in which tall and light-skinned Tutsis were aggressors from the north to be sent back on the waters that had brought them.<sup>118</sup> Asserted differences in race and biology are frequent sources for abusive ontologies.<sup>119</sup> An abuse sustaining truth can also be more obviously political, as was the case in Argentina, where the Dirty War on communism allowed state agents to

112. Goldhagen, *supra* note 17, at 49-128.

113. Rosenbaum, *supra* note 102, at 11 ("A review of some of the fateful occurrences that eventuated in the Nazi 'Final Solution to the Jewish Question' will demonstrate that the exterminative activities were the outcome of, among other factors, a virulent antisemitism."); Wiesenthal, *supra* note 101, at 15. See generally Jeremy Cohen, *The Friars and the Jews: The Evolution of Medieval Anti-Judaism* (1982); Joshua Trachtenberg, *The Devil and the Jews: The Medieval Conception of the Jew and Its Relation to Modern Anti-Semitism* (Jewish Publication Soc'y 1983) (1943).

114. See Davidson, *supra* note 101, at 7; Wiesenthal, *supra* note 101, at 11-28.

115. Goldhagen, *supra* note 17, at 8, 11-13, 416-54; Rosenbaum, *supra* note 102, at 11-16.

116. To provide a rough description of the landscape, Nazi Germany, the Rwandan genocide, Argentina during the 1960s and 1970s, the antebellum American South, and Apartheid South Africa all provide examples of cases in which an abusive public face of law is sufficiently central that an excuse may be appropriate. Abuses perpetrated in the American South after Reconstruction, the massacre at My Lai, and abuses at Abu Ghraib would not.

117. Rorty, *supra* note 17, at 112-16.

118. Gourevitch, *supra* note 17, at 47-62; see also Colette Braeckman, *Incitement to Genocide*, in *Crimes of War 192* (Roy Gutmann & David Rieff, eds., 1999); Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda* (1999), available at <http://www.hrw.org/reports/1999/rwanda>.

119. See Goldhagen, *supra* note 17, at 66-69; Richard M. Lerner, *Final Solutions: Biology, Prejudice, and Genocide* (1992); Robert S. Wistrich, *Antisemitism: The Longest Hatred* (1991).

torture, disappear, and murder thousands of Argentines;<sup>120</sup> or even consciously constructed, as historian John W. Dower documents with respect to war crimes perpetrated in the Pacific theater during World War II.<sup>121</sup>

In some cases state approval is tacit, manifested by passivity in the face of abuses.<sup>122</sup> In others state support is active and organized.<sup>123</sup> In some instances laws against murder are not enforced or are interpreted as not protecting certain groups.<sup>124</sup> In still others black-letter law or official state policies require murder.<sup>125</sup> In all cases, however, state support expressed as an abusive public face of law is a necessary corollary of mass atrocity. To conclude the contrary would be to claim that the Holocaust, the Argentine Dirty War, the abuses of Apartheid, and the Rwandan Massacre were no more than unhappy coincidences of independent criminal action.

Calls for transition and the institutional and social reforms that transitions entail serve as further evidence of the above descriptive claim. While acts of violence stand out against the backdrop of a stable state, the acts that characterize pre-transitional societies blend into a society whose pathology runs so deep that massive political, social, cultural, and legal change is necessary.<sup>126</sup> The requirement for reform only makes sense if one recognizes that there is something deeply wrong with abusive regimes.<sup>127</sup> An abusive public face of law is both evidence of what is wrong and, as expressed and advanced through public institutions, a tool of atrocity.<sup>128</sup>

It does not, for the moment, matter where the "truth" that underlies and sustains abusive regimes comes from. Whether it is a result of colonial

120. Malamud-Goti, *supra* note 29, at 71-145; Nino, *supra* note 29, at 44-50; Alexandre de S.C. Barros & Edmundo C. Coelho, *Military Intervention and Withdrawal in South America, in Armies & Politics in Latin America* 437-43 (Abraham F. Lowenthal & J. Samuel Fitch eds., 1986); Guillermo A. O'Donnell, *Modernization and Military Coups: Theory, Comparisons, and the Argentine Case, in Armies & Politics in Latin America*, *supra*, at 96; Nunca Más: Part V, *supra* note 100.

121. John W. Dower, *War Without Mercy: Race and Power in the Pacific War* (1986).

122. The most notorious contemporary examples of tacit government approval of abuses come from Colombia. See Noam Chomsky, *Rogue States: The Rule of Force in World Affairs* 62 (2000).

123. See, e.g., Gourevitch, *supra* note 17, at 85-96 (noting papers and periodicals supporting the genocide).

124. Goldhagen, *supra* note 17, at 97-98; Rorty, *supra* note 17, at 112-15; Teitel, *supra* note 16, at 18-20.

125. E.g., Gourevitch, *supra* note 17, at 96 ("The law . . . mandated death to 'accomplices' of the 'cockroaches' [the Tutsis] . . .").

126. Van Zyl, *supra* note 5, at 661 (pointing out that criminal justice is more appropriate for stable states where abuses are the exception rather than the norm).

127. Ackerman, *supra* note 6, at 5.

128. I allude, here, to philosopher Michel Foucault's famous "Regime of Truth." Michel Foucault, *Truth and Power, in The Foucault Reader* 74 (Paul Rabinow ed., 1984). While the transitional justice literature does not yet include a rigorous ethnography of abusive regimes, the literature is rife with monographs documenting the intricate interplay of truth, institutions, and practices of power in the genesis of atrocities. See, e.g., Mark Danner, *The Massacre at El Mozote* (1993); Goldhagen, *supra* note 17; Gourevitch, *supra* note 17; Malamud-Goti, *supra* note 29; Nino, *supra* note 29; Power, *supra* note 29.



involvement, political strategy, or timeless narrative, the effect is the same: There is a rational social grounding for pre-transitional abuses.<sup>129</sup> This socio-ontological support combines with actual laws on the books, official doctrine, and state practice to construct an abusive public face of law that affects interpretations of legal duty in abusive states and establishes the conditions necessary for mass atrocities on a scale that then requires systemic transition and transitional justice.<sup>130</sup>

The public face of law in abusive regimes and the role it plays in individual actions highlights a critical difference between normal criminal activity and abuses committed by and under abusive regimes without obscuring the importance of heterogeneity in pre-transitional states. Those who participate in mass violence choose to become abusers, some grudgingly and some with frightening enthusiasm. The critical point defended in this Article is that these choices are not made in solipsistic isolation. Abusive regimes are “burdened” societies.<sup>131</sup> Atrocities committed by and under abusive regimes reflect an operating set of socially generated and publicly circulated beliefs that, in combination with institutional practices and government policies, form a public face of law that at least does not forbid violence against a victim group, and often actively encourages it.

This claim does not defend or rely on cultural determinism.<sup>132</sup> Those living under abusive regimes can choose not to participate in atrocities, as evidenced by those who oppose abusive regimes from within, often at great peril. It also does not imply that conformance to an abusive public face of law justifies abuse. Rape, murder, and torture are evils no matter what the law says.<sup>133</sup> The only claim that need be made is that the public face of law, as it appears to those living under an abusive regime, does not forbid, and frequently encourages, human rights violations directed against particular individuals and groups.<sup>134</sup> This official support distinguishes institutionalized mass violence from banal criminal activity or small-scale

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129. Goldhagen, *supra* note 17, at 14-15.

130. Elster, *supra* note 21, at 83; Teitel, *supra* note 16, at 29.

131. Rawls, *supra* note 20, at 5, 106-13.

132. Note, *The Cultural Defense in the Criminal Law*, 99 Harv. L. Rev. 1293 (1986); Julia P. Sams, Note, *The Availability of the “Cultural Defense” as an Excuse for Criminal Behavior*, 16 Ga. J. Intl. & Comp. L. 335 (1986); Malek-Mithra Sheybani, Comment, *Cultural Defense: One Person’s Culture Is Another’s Crime*, 9 Loy. L.A. Int’l & Comp. L.J. 751 (1987). The defense is not particularly new, however. See *Rex v. Esop*, (1836) 173 Eng. Rep. 203.

133. Ronald Dworkin, Internal Realism (Aug. 15, 2001) (unpublished manuscript), available at <http://www.law.nyu.edu/clppt/program2001/readings/reading2/internalrealism.pdf> [hereinafter Dworkin, Internal Realism]; see also Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 Phil. & Pub. Aff. 87 (1996) [hereinafter Dworkin, *Objectivity and Truth*].

134. Goldhagen, *supra* note 17, at 14-15, 80-163; Gourevitch, *supra* note 17, at 96, 110-131.

abuses of power perpetrated by cadres of opportunists<sup>135</sup>—the conditions well understood by ordinary justice.

B. *The Normative Significance of an Abusive Public Face of Law*

That past wrongs enjoyed official and social approval presents significant deontological and consequentialist challenges to criminal trials in transitions to democracy.<sup>136</sup> Transitional movements count among their highest commitments dedication to the rule of law.<sup>137</sup> The rule of law, which shapes the call for trials in transitions, retains a strong commitment to the principle of *non malum sine lege*, or the legality principle.<sup>138</sup> Whether rendered as *non malum sine lege* or a prohibition against *ex post facto*<sup>139</sup> enforcement of law, the principle of legality prohibits states from punishing acts that were not against the law at the time they were committed.

The problem of legality is at the center of transitional justice debates.<sup>140</sup> The Constitutional Court of Hungary met the issue in its review of a law allowing prosecutions of those responsible for the suppression of the 1956 uprising.<sup>141</sup> The law repealed statutes of limitation and criminalized activities that were encouraged under the predecessor regime. When called to rule on the constitutionality of the new law, the equally new Constitutional Court recognized a “paradox of the revolution of the rule of law”<sup>142</sup> and found itself forced to decide between “the principle of predictability and foreseeability” which grounds the “criminal law’s prohibition of the use of retroactive legislation,” and the rule of law understood as substantive justice.<sup>143</sup> For the court, the paradox was a result of a situational division between the rule of law as an agent of right and the

135. Bhargava, *supra* note 99, at 45-50.

136. Aukerman, *supra* note 4, at 59, 75.

137. Elster, *supra* note 21, at 83, 235-40; Minow, *supra* note 36, at 25, 30-37; Golding, *supra* note 57, at 170-74.

138. See Andrew Ashworth, *Principles of Criminal Law* 70-74 (1991); Fuller, *supra* note 58, at 39, 248-49; Jerome Hall, *General Principles of Criminal Law* 27-69 (2d ed. 1960); Herbert L. Packer, *The Limits of the Criminal Sanction* 79-87 (1968); see also William Blackstone, 1 *Commentaries* \*45-47; Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630, 650-51 (1958).

139. The United States Constitution establishes the principal in these terms. See U.S. Const. art. I, §§ 9-10.

140. Ackerman, *supra* note 6, at 74; Elster, *supra* note 21, at 235-40; Fuller, *supra* note 58, at 245-53; Teitel, *supra* note 16, at 11-26, 33-36; Aukerman, *supra* note 4, at 75; David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, in *Truth v. Justice: The Morality of Truth Commissions*, *supra* note 9, at 99, 105-06. Contemporary discussions of legality in the context of transitional justice owe a debt to Professors H.L.A. Hart and Lon Fuller and their series of articles in the *Harvard Law Journal* known as the Hart-Fuller debate. Fuller, *supra* note 138, at 648-61; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 615-24 (1958).

141. Judgment of March 3, 1992, [Constitutional Court] MK. No. 11/1992 (Hung.), translated in 1 *J. Const. L. in E. & Cent. Eur.* 129 (1994).

142. *Id.* at 138 (internal quotation omitted).

143. *Id.* at 141.

rule of law as a regulative ideal. In the end, the court decided that the revolutionary role of law as an agent of change could not trump the principles of predictability internal to the rule of law.<sup>144</sup>

German courts faced an almost identical issue in the border-guards cases.<sup>145</sup> The guards accused of shooting East Germans fleeing across the border claimed that they were executing a legal duty.<sup>146</sup> The courts were asked to decide to what extent the law of the previous regime provided a defense. Recognizing that laws, such as those under which the border guards acted, may be formally valid but not substantively right, the Germans allowed the prosecutions to proceed.<sup>147</sup> In terms of the dilemma posed by the principle of legality they chose the transformative potential of the law over its formal duties of predictability and fair warning.

These are but two examples. Because of the critical role played by the public face of law in abusive regimes, all transitions confront legality. That courts have come to different conclusions emphasizes the difficulty of the issues.

### 1. The Legality Principle as an Excusing Condition for Most Implicated in Pre-transitional Abuses

Given that mass atrocities enjoy state support and comport with the prevailing public face of law, broad criminal prosecutions in transitions would violate the principle of legality with respect to most persons who may be targets for prosecution. Taking account of legality in transitions does not require forgoing all prosecutions, however. Rather, a proper accounting of legality concerns results in vertically limited prosecutions<sup>148</sup> that focus on high-level leaders who are directly exposed to the demands of international laws against genocide<sup>149</sup> and crimes against humanity,<sup>150</sup> each of which can provide grounds for individual criminal liability.<sup>151</sup>

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144. *Id.* at 152-54; accord *Judgment of the Constitutional Court of Hungary, No. 2086/A/1991/14*, in 3 *Transitional Justice*, *supra* note 25, at 629, 635-36; see also László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* 19 (2000).

145. *Berlin State Court, No. (523) 2 Js 48/90 (9/91)*, in 3 *Transitional Justice*, *supra* note 25, at 576.

146. *Id.*; Teitel, *supra* note 16, at 16.

147. *Berlin State Court, No. (523) 2 Js 48/90 (9/91)*, *supra* note 145, at 576; Teitel, *supra* note 16, at 16-17.

148. I am in debt to author Paul van Zyl for this terminology.

149. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*]. For an exhaustive account of the Convention, its genesis, application, and challenges, see generally William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2000). The Convention has a colored and complicated history internationally and in the United States. For an engaging account, see Power, *supra* note 29, at 46-169.

150. Crimes against humanity first became a critical tool of international law practice after World War II as part of the Nuremberg Charter. Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288. The most current iteration of crimes against humanity in international law is found in the statute,

For an act to be a crime it must be a transgression of law—*nullum crimen sine lege*.<sup>152</sup> The principle of legality in criminal jurisprudence centers on two concerns. First, the fair and legitimate use of the police power of the state is predicated on an obligation of fair warning—*nulla poena sine lege*.<sup>153</sup> Citizens must have a reasonable chance to know the law so that they will know which acts will be punished and which will not.<sup>154</sup> This is really two requirements, one of formal warning<sup>155</sup> and one of clarity.<sup>156</sup> Black-letter law and consistent state action satisfy the first requirement.<sup>157</sup> Lucidity, publicity, and regular enforcement satisfy the second.<sup>158</sup> Excessively vague laws provide little or no guidance and are unenforceable.<sup>159</sup>

The second concern that motivates the principle of legality centers on those charged with enforcing the law. Two key principles of fairness in the enforcement of law are predictability and consistency.<sup>160</sup> Black-letter law provides enforcement officials with basic guidelines needed to regulate social behavior. Clear law guards against “discriminatory and arbitrary enforcement.”<sup>161</sup> Without law, police agents may act on their own impulses, and enforcement of social mores may become arbitrary and

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known as the Rome Statute, establishing the International Criminal Court. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

151. See, e.g., *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment (May 21, 1999); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998); *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997); 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 2 (*United States v. Ohlendorf et al. (The Einsatzgruppen Trial)* (1948)).

152. The legality principle is widely viewed as a central tenet of “the rule of law.” See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 102-21 (1982); Fuller, *supra* note 58, at 51-65, 245-53; John Rawls, *A Theory of Justice* 238 (1971). For a more detailed account of how this principle is an essential feature of the rule of law in new democracies, see Golding, *supra* note 57, at 170-74. The constitutional rule against retrospective enforcement, the core of the legality requirement, is set out in Article I, Sections 9-10, of the United States Constitution: “No Bill of Attainder or ex post facto Law shall be passed.”

153. Fuller, *supra* note 58, at 58-59; Hall, *supra* note 138, at 27-64.

154. See *Marks v. United States*, 430 U.S. 188, 191 (1977).

155. The requirement for some form of law is central to both Roman and common law traditions. See *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220 (H.L. 1961) (U.K.); A.T. Denning, *Freedom Under the Law* 40-42 (1949). *Shaw* has met with some dispute in the academic community. See H.L.A. Hart, *Law, Liberty, and Morality* 7-12 (1963). These objections, however, do not go to the central rule forwarded in *Shaw*, namely that judges may not create offenses for individuals out of vague commitments to public good.

156. *Judgment of the Constitutional Court of Hungary*, No. 2086/A/1991/14, *supra* note 144, at 629 pmbl., 631 pt. IV(3), (4); Fuller, *supra* note 58, at 63-65; John Calvin Jeffries, Jr., *Legality, Vagueness and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985).

157. Teitel, *supra* note 16, at 19 (“The validity of prior law depended on the social practices of the time, such as the norm’s publication and transparency.”).

158. Packer, *supra* note 138, at 79-87, 287.

159. Jeffries, *supra* note 156, at 196.

160. See Hall, *supra* note 138, at 36-54.

161. *Parker v. Levy*, 417 U.S. 733, 775 (1974) (Stewart, J., dissenting).

completely dependent upon the officer, prosecutor, or judge at hand.<sup>162</sup> Law provides a hub around which enforcement activities revolve. The principle of legality ensures that regulation of social action and the use of state police power will be rule-bound, consistent, fair, and legitimate.<sup>163</sup>

Both of these justifications of the legality principle focus on the role that the judiciary and the executive play in democratic regimes and under the rule of law. Judges and courts have the limited duty to apply law.<sup>164</sup> Other processes of justification propagate law itself.<sup>165</sup> As a rule courts may not indulge in legislative behavior. The law that they must apply binds them.<sup>166</sup> Without law to apply, courts and police are without moral and legal authority to act. Exercise of state power in the absence of legal authority is a hallmark of abusive regimes.<sup>167</sup>

One might favor a more active role for judges. Indeed, a reason offered in favor of criminal trials in transitions is that trials can model commitments to the rule of law while establishing an independent judiciary.<sup>168</sup> The judiciary has proven to be a valuable agent of reform in stable societies.<sup>169</sup> Given these potentials, it might seem odd to take a strict view of the judiciary's role in transitions when the need for reform is so great.<sup>170</sup>

There are two points to be made here. First, the criminal law is not the best tool in the arsenal of an activist court. Historically, courts favor activism only to sponsor tort or regulatory reform.<sup>171</sup> Where courts do use the criminal law in a reform capacity, it is usually to add excuses or justifications rather than create new crimes. This is a reflection of the

162. While the regulative principle of legality plays a key role in states committed to the rule of law, abusive regimes are defined by their use of state authority to emphasize the personal power of individuals and the enigmatic power of the regime. See Malamud-Goti, *supra* note 29, at 124-39.

163. Jeffries, *supra* note 156, at 192-93. Notably, this version of "fairness" does not include a requirement that the law is "right." The premium is on clarity and forewarning.

164. See R.A. Duff, *Trials and Punishments* 138 (1986); Jürgen Habermas, *Between Facts and Norms* 115, 171-74 (1996).

165. Habermas, *supra* note 164, at 171-74 (pointing out the centrality of civil society and legislatures in justifying and propagating laws).

166. The idea that written rules can bind judges is contested. See, e.g., Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 87-119, 294-314 (1989); Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, in *Interpreting Law and Literature: A Hermeneutic Reader* 115 (Sanford Levinson & Steven Mailloux eds., 1988). But see Richard A. Posner, *Law and Literature: A Misunderstood Relation* (1988); Ronald Dworkin, *Law as Interpretation*, 60 *Tex. L. Rev.* 527 (1982).

167. See Fuller, *supra* note 58, at 245-53; Malamud-Goti, *supra* note 29, at 124-39.

168. Teitel, *supra* note 16, at 23-26.

169. Michael Heise, *Litigated Learning and the Limits of Law*, 57 *Vand. L. Rev.* 2417, 2446-56 (2004) (discussing the rise of policy litigation after *Brown v. Board of Education*, 347 U.S. 438 (1954)).

170. Ackerman, *supra* note 6, at 99-112; Teitel, *supra* note 16, at 22-26.

171. See generally Daniel Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity* (2000); Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 *U. Pa. L. Rev.* 47 (1977); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 *Harv. L. Rev.* 509 (1986); Saul Levmore, *Changes, Anticipations, and Reparations*, 99 *Colum. L. Rev.* 1657 (1999).

principle of legality.<sup>172</sup> Second, judicial activism does not resolve legality concerns. Ex post facto laws are no more just coming from judges than from a legislature.<sup>173</sup>

The principle of legality, as presented here, might strike some readers as unique to a positivist conception of the law.<sup>174</sup> Specifically, the principle may seem to imply that law is limited to black-letter law, without regard to natural right.<sup>175</sup> Such a perspective begs important questions about the source and nature of law and ignores a long tradition of scholarship that argues for a close relationship between morality and law.<sup>176</sup> These concerns are discussed in later parts of this Article. For now, it will suffice to raise a few points for consideration.

First, to the extent that the legality principle is positivist, the rule of law is positivist. This is not as bold a commitment as it may appear. One need not believe that law and morality are entirely separable<sup>177</sup> to believe that laws on the books play an essential role in the fair and just exercise of legal force. The rule of law is not the same as the rule of laws, which more aptly describes the pejorative<sup>178</sup> use of "positivism."<sup>179</sup> Non-pejorative positivism simply points out that law and morals are not necessarily linked.<sup>180</sup> The principle of legality is positivist insofar as it recognizes that law and morality sometimes diverge. Where this occurs, the principle contends that punishment cannot be justified based on morality alone, but must be measured by the external and objective standards of law.<sup>181</sup>

Second, these debates are beside the point in the present context. There may be other ways to conceive of the law without the principle of legality. Speculation about these other worlds serves little purpose in the present debate, however, because legality is central to the rule of law as it has developed in constitutional democracies.<sup>182</sup> In contrast to their

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172. Jeffries, *supra* note 156, at 191-95. This strong attachment to the legality principle in the criminal context coupled with a willingness to relax the principle in tort law has been longstanding in the American system. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

173. See *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (holding unconstitutional a state court's extension of criminal trespassing law); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 10-14 (1997).

174. *Trial of Border Guards: Berlin State Court, No. (523) 2 Js 48/90 (9/91)*, *supra* note 145, at 576, 578-85.

175. John Austin, *The Province of Jurisprudence Determined* 180 (Wilfrid E. Rumble ed., 1995).

176. This debate is as old as law itself. Perhaps the best exchange on the topic is found in the Hart-Fuller debate. Fuller, *supra* note 138, at 630; Hart, *supra* note 141, at 593. Hart concedes that laws in a well-ordered legal regime should coincide with core features of social morality. *Id.* at 622-24.

177. Austin, *supra* note 175, at 136-41.

178. Hart, *supra* note 141, at 595.

179. Golding, *supra* note 57, at 171-72.

180. Austin, *supra* note 175, at 136-41.

181. Hall, *supra* note 138, at 36-55, 58-64. This position is entirely consistent with the claim that one has a moral obligation not to obey immoral demands. See Fuller, *supra* note 138, at 651-56.

182. See Guyora Binder, *Punishment Theory: Moral or Political?*, 5 Buff. Crim. L. Rev. 321, 331-32 (2002).

predecessors, faithfulness to legality and the rule of law is a central aspirational goal of transitions.<sup>183</sup> In the context of transitions to democracy, then, rejecting legality would change the face of the movement entirely, putting the transitional regime at risk of hypocrisy, threatening its moral status and its ultimate potential for success.<sup>184</sup>

Third, the principle of legality is not unique to positivist conceptions of the law. It is a function of other moral and political principles. As Lon Fuller argues, legality is part of the essential internal morality of the law.<sup>185</sup> The rules in the rule of law are the minimum standards necessary to achieve an ordered society. Primary among these is a prohibition against ex post facto enforcement of criminal law. To ignore this principal in practice would be to undermine the moral and practical goals of law and legal practice. Thus, even if a transitional government faces a past regime that was not legitimate, just, right, or moral, the new state is bound by its own commitment to the rule of law.<sup>186</sup> To pursue a course of retroactive lawmaking would be symptomatic of the exact legal pathology that the new state aspires to cure.<sup>187</sup>

Finally, the legality principal is inextricably bound to core democratic and human rights values of autonomy and concomitant limitations on the use of state power. The core interest represented by legality is fair warning.<sup>188</sup> To justify coercion, a violation of autonomy, the law must provide fair warning. Agents have a right to know beforehand that their acts are punishable under the law. If there is no law or if the law is too vague and ambiguous, it is not fair to punish an agent who had no warning that his actions were punishable. Efforts by courts or police to circumvent this principle undermine the rule of law, which provides for the ultimate sovereignty of the law itself,<sup>189</sup> particularly in transitional regimes.<sup>190</sup>

The principle of legality comes down to a prohibition on retroactive enforcement of law. Agents under the law must know that their actions risk punishment. By definition, abuses in *ancién regimes* were not under such a threat. Thus transitional courts cannot punish pre-transitional bad acts insofar as they were consistent with the public face of law. To conduct criminal trials in these conditions would be to violate a foundational principle of the rule of law.

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183. Elster, *supra* note 21, at 83, 235-36; Golding, *supra* note 57, at 171-72; *see also* Fuller, *supra* note 58, at 248-49, 252.

184. Fuller, *supra* note 58, at 248-49.

185. Fuller, *supra* note 138, at 650-57; *see also* Fuller, *supra* note 58, at 39, 248-49.

186. Fuller, *supra* note 58, at 39, 248-49.

187. *Id.*; Golding, *supra* note 57, at 182-87.

188. Fuller, *supra* note 58, at 58; Golding, *supra* note 57, at 181-82.

189. Fuller, *supra* note 58, at 157-62.

190. Golding, *supra* note 57, at 180 (pointing out the "pathology" of retroactive laws).

## 2. The Positive Potential of Legality in Transitions and a Focus on Public Agency

As is apparent in the foregoing discussion, the legality principle is concerned centrally with persons in their roles as legal agents.<sup>191</sup> This principle points out that citizens are only subject to legal punishment in their statuses as legal agents. This is significantly different from the often similar structures of moral blame inasmuch as the law plays a necessary role in constructing legal guilt.<sup>192</sup> Moreover, under the legality principle, legal punishment is grounded in a presumption that those living under the law take account of law in their decision making. Punishment is reserved exclusively for acts committed by persons in their public status as legal agents under the public face of the law. This is true for both consequentialist and deontological legal theories.

Accounting for the role played by legality in legal agency and legal blame has important consequences for transitional justice. Negatively, taking seriously the role of public agency in constructing legal blame reaffirms the consequences of legality as an objection to broad criminal prosecutions in transitions. The principle of legality and the concerns that underlie it justify punishment by assuming that criminals were warned.<sup>193</sup> Punishing in the absence of the warning either violates the moral autonomy of the accused,<sup>194</sup> or it is pointless,<sup>195</sup> or both.

As to the positive consequences, Justice Oliver Wendell Holmes famously argued that law is, by its nature, concerned only with effect, and not with moral culpability.<sup>196</sup> His fellows and followers calculate punishment according to equations of deterrence and social cost.<sup>197</sup> The publicly accessible agent is front and center in such theories. Punishment is rational only inasmuch as it can play a part in the decisions of those living under the law. As philosopher H.L.A. Hart puts it, law is designed "to guide individuals' choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience."<sup>198</sup> "Reasons" here go beyond simple threats. Law also serves an expressive function, publicly

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191. James Bohman, *Punishment as a Political Obligation: Crimes Against Humanity and the Enforceable Right to Membership*, 5 Buff. Crim. L. Rev. 551, 552-53 (2002).

192. Karl Jaspers, *The Question of German Guilt* 25-26, 57-64 (E.B. Ashton trans., Fordham Univ. Press 2000) (1947).

193. See Ashworth, *supra* note 138, at 86-87.

194. Duff, *supra* note 164, at 170-72 (pointing out that instrumental goals cannot justify punishment, as a violation of autonomy, absent a violation of law).

195. Igor Primoratz, *Justifying Legal Punishment* 23 (1989).

196. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459-60 (1897).

197. 1 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* [hereinafter *Introduction*], in *The Works of Jeremy Bentham* 86 (John Bowring ed., Edinburgh, William Tait 1843) [hereinafter *Works*]; 1 Jeremy Bentham, *Principles of the Penal Law* [hereinafter *Principles*], in *Works*, *supra*, at 365; see Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193 (1985).

198. H.L.A. Hart, *Punishment and Responsibility* 44 (1968).



declaring what is right.<sup>199</sup> In any event, punishing past acts based on novel shifts in the public face of law is without purpose because the changes do not, by definition, have an impact on the legal agent in her pre-shift public mode and punishing based on pre-shift acts does not provide significant comparative benefit over punishment based on post-shift acts.<sup>200</sup>

Taking note of the role of public agency highlighted by the legality principle also has positive import for transitional justice. By making public agents the objects of punishment, advocates of utilitarian legal theories depend on the possibility that those living under the law could act differently under a different public face of law. Reflecting back to the principle of legality, the objection points out that former abusers might act differently under the laws of a new state. It would be inefficient, pointless, and ultimately unfair<sup>201</sup> to assume otherwise. It follows that consequentialist concerns, such as deterrence, are better served in transitional circumstances by focusing on post-transitional behavior.<sup>202</sup>

Deontological constructions of legal wrong also invoke a public agent. As Jerome Hall points out, the legality principle is a solution to the problem of coercing autonomous agents.<sup>203</sup> Treating another as an end, and not merely as a means, assumes that they had the relevant capacities and information to make a decision.<sup>204</sup> Knowledge and intent are central in this model of agency. Assignments of blame and responsibility further assume that the accused can appreciate the wrongness of her actions. Thus, punishment is designed to reflect on the nature of the wrong, treating the criminal as an agent who has chosen her acts. Owing to this account, Georg Hegel argued that punishment is a right of the criminal, reflective of her autonomy.<sup>205</sup> Reciprocally, if an agent could not have known that her action was illegal, as distinct from simply wrong, then there is no ground to hold her criminally liable.<sup>206</sup>

199. Duff, *supra* note 164, at 233-40; Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* 95 (1970); Primoratz, *supra* note 195, at 145-54; Hampton, *supra* note 68, at 208.

200. See *infra* Part IV for a further discussion of this point.

201. Justice Oliver Wendell Holmes thought that the common law would "by the necessity of its nature" give up such words. Holmes, *supra* note 196, at 459. Basic principles of fairness have become more entrenched with the prevalence of rule utilitarian decision procedures that adopt deontological standards for qualification to and utilitarian measures of punishment. See, e.g., Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 Nw. U. L. Rev. 19 (1988). Holmes himself retains excuses for infants and for the insane because they are not able to participate as full public agents in their decisions. Thus, while he may not approve of the term "fairness" sneaking into the conversation, it is clear that he would agree with the point in this context.

202. See *infra* Part IV.

203. See Hall, *supra* note 138, at 58-64.

204. See Duff, *supra* note 164, at 14-38.

205. Georg Hegel, *Philosophy of Right* ¶ 100 (T.M. Knox trans., Oxford Univ. Press 1952) (1821). But see John Deigh, *On the Right to Be Punished: Some Doubts*, 94 Ethics 191 (1984) (critiquing Georg Hegel's argument).

206. Duff, *supra* note 164, at 20-38.

In a transitional context, trials violate the autonomy of agents cast in their public roles under the law by punishing them for actions that were not, in fact, against the public face of law propagated by the abusive regime. Note that this does not extend to moral blame. The legality excuse defended in this Article is exclusively a function of the split between moral and public agency and the corresponding division between moral and legal blame.<sup>207</sup> The principle of legality provides a shield against legal punishment only. There is plenty of room left for assignments of moral blame and responsibility for repair and reform.<sup>208</sup>

Beyond the deontological concern for treating individuals as ends, Immanuel Kant is well-known for his assertion that law is a tool for solving the problem of justice among a race of devils.<sup>209</sup> Even for Kant, then, law is, at least in part, a coercive tool, playing a role similar to that played in more purely consequentialist theories of criminal punishment. Pointing out that devils should not be punished for failures of the public face of law is simply to say that it is both unjust and pointless to "make someone suffer a punishment unless the individual was given a fair warning that his act would bring it down on him."<sup>210</sup> The claim here is not that abusers from the past would have acted differently if they had been living in a different legal culture; rather, the claim from legality is that it is unfair and inefficient to assume that they would not have.

Trials, as opposed to private condemnation or moral blame, assume the existence of a legal prohibition in the construction of responsibility and the justification of punishment. Understanding the agency significance of legality puts an important positive spin on objections to transitional trials derived from the legality principal. Specifically, by recognizing the role of an abusive public face of law in pre-transitional abuses, transitional regimes can recognize not only the transitional potential of political, social, and legal reform, but also the transitional potential of individual abusers. Transitional jurisprudence must take normative account of this and design transitional procedures that reflect potential for change. The legality objection is one result of this accounting. As is argued in the remainder of this Article, proper distribution of an excuse based on legality provides both a normative structure for hybrid programs of transitional justice and practical guidance for executing these programs in particular transitional circumstances.

### *C. An Affirmative Excuse Based on Legality*

Pre-transitional bad acts reflect an abusive public culture. An abusive culture, in turn, is linked to broad complicity in abuses committed by and

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207. This distinction is already familiar in the common law. See Ashworth, *supra* note 138, at 42-43.

208. Jaspers, *supra* note 192, at 67-75.

209. Kant, *supra* note 82, at 24-32.

210. Golding, *supra* note 57, at 181.

under pre-transitional regimes. Broad complicity poses problems for justice in transitions both because of the large numbers of potential defendants and because it exposes deeper, more theoretical, problems for criminal trials in transitions posed by legality. A transitional movement must sort through these problems if it hopes to seek justice for past wrongs. The key shift in thinking motivated here is a realization that these challenges do more than pose problems for programs of prosecution in transitions—they point out transitional differences to be accounted for, not merely accommodated, by transitional jurisprudence.<sup>211</sup>

Because transitional justice is an exercise in nonideal theory,<sup>212</sup> a full accounting of these elements should provide some positive descriptive significance for a jurisprudential theory of transitional justice. One key feature of transitions that must be accounted for is that there is a transition. Stable state justice is a matter of enforcing and further refining an operating vision of right. In transitions the vision itself is under construction.<sup>213</sup> Complicity, legality, and other challenges to justice in transition serve practical and theoretical notice of the shift.<sup>214</sup> The challenge for transitional justice is to find a way to address past wrongs that is consistent with the basic tenets of the rule of law but takes principled account of the fact that there is a transition.

Taking note of the connection between pre-transitional conditions and pre-transitional abuses on the one hand, and between transitional movements and commitments to alter the public face of law on the other, indicates how this challenge can be met. Advocates for criminal trials in transitions are rightly concerned about limitations on and objections to prosecutions because, as they see it, a transition that fails to prosecute all those implicated in past abuses compromises its duty to do justice, though necessity may demand such a compromise.<sup>215</sup> In my view, this is too drastic a conclusion. If the factors that impose limitations on criminal prosecutions describe unique conditions that have theoretical significance for transitional jurisprudence then it is not the case that limited prosecutions are compromises against justice in transitions. Quite the contrary, the point is that broad prosecutorial strategies are not transitional. They are ill-considered attempts to recreate stable state justice in transitions that fail to take account of transitional realities and to capitalize on transitional opportunities.

Recognizing the role of the public face of law in abusive states in light of transitional commitments to legality erases the apparent justice gap opened by the difference in the numbers of those implicated in past wrongs and the

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211. *But see* Posner & Vermeule, *supra* note 7 (arguing that transitional justice must accommodate its challenges just as stable state justice must accommodate its challenges).

212. De Greiff, *supra* note 6, at 79-82.

213. *See* Ackerman, *supra* note 6, at 99-112.

214. *See* Teitel, *supra* note 16, at 39-49.

215. Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, Law & Contemp. Probs., Autumn 1996, at 197; *see* Orentlicher, *Settling Accounts*, *supra* note 2, at 2602-03.

capacity of transitions to conduct criminal trials. Broad complicity and correspondingly large numbers of potential defendants reflect the fact that publicly and institutionally approved practices and social norms fuel pre-transitional abuses. Given that most who participate in pre-transitional abuses live under an abusive public face of law, broad prosecution programs would not be appropriate. It is not merely that transitions cannot punish all of those implicated in past abuses, it is that most of those implicated ought not be punished.

Legality concerns are best met, then, not by giving up on criminal trials altogether but by determining who might qualify for an affirmative defense. While the details of such an excuse would be context dependent, for purposes of advancing the conversation, I offer the following:

#### DEFENSE FROM LEGALITY

It is an affirmative defense for the actor engaged in the conduct charged to constitute an offense if the act reflects a reasonable<sup>216</sup> interpretation of the prevailing public face of law. "Public face of law" encompasses formal legislation, executive orders, the body of prevailing public threats, institutional expectations represented by institutional agents<sup>217</sup> and commonly represented public and legal expectations as they would have been perceived by a person in the actor's condition and position at the time of his act.

The legality defense is not available if:

- (1) The act is not within the scope of expectations presented by the public face of law.<sup>218</sup>
- (2) The act does not reflect the public demands on the claiming agent.
- (3) The agent is not, himself or herself, subject to the public face of law.<sup>219</sup>

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216. "Reasonable" is meant to capture the narrow rationality of a public agent under the law. There is, as will be maintained throughout this Article, nothing reasonable, in the sense of justifiable, about murder, rape, or genocide. Rather, the point is that a legal agent *qua* legal agent only knows what the law demands by interpreting the law through the body of social beliefs and official actions, which constitute the public face of law. That moral agents have an abiding duty to recognize the evil in an abusive public face of law is, from the point of view of the legality principle and its focus on justified uses of punitive authority, beside the point.

217. Particularly in respect of the role of official actions in the construction of the public face of law, the legality defense shares the same concerns that underlie Model Penal Code sections 2.04(3)(b) and 2.04(4), which provide an affirmative defense based on mistakes of law attributable to statutes, statements by judges, and interpretations by executive authorities. Model Penal Code § 2.04 (2002).

218. Sub-point (1) secures prosecutorial privilege in cases where agents move beyond the basic scope of the culture of abuse.

219. Sub-points (2) and (3) clarify conditions of recognition for agents identified in sub-point (1), and provide independent ways to negate the defense where specific proof of motive cannot be produced.

(4) The agent is directly responsible to another body of law and is not under direct threat from an abusive public face of law.

(5) The actor is under obligations that reflect a special status to which he or she has voluntarily submitted where this status is expected to supersede all other demands on his or her behavior.<sup>220</sup>

Providing a defense to agents of pre-transitional abuse based on the legality principle performs the necessary practical and theoretical task of converting the unique characteristics that define pre-transitional abuses and transitions into normative conditions relevant to transitional justice. Extension of the excuse recognizes that many, if not most, pre-transitional bad acts were committed by individuals who, given the nature of the public face of law under the abusive regime, were justified in believing that what they did was right, necessary, or at least not subject to legal punishment.

Recognizing transitional commitments to the rule of law in this way also highlights the prospective nature of transitional justice.<sup>221</sup> The function of trials in stable states is to reaffirm commitments to right established by law.<sup>222</sup> Transitional justice is, in large part, a process of rejecting old commitments embodied in the abusive public face of law to establish new commitments to democratic principles, human rights, and the rule of law.<sup>223</sup> Transitions are defined by the need to produce significant changes in public norms, practices, and consciousness to carry an abuse-ridden society into a new period characterized by commitments to human rights and the rule of law.<sup>224</sup> Organizing transitional justice programs around recognition and extension of an excuse to individual actors serves these prospective transitional justice goals in a number of ways.

First, it highlights the potential and necessity to transform citizens of an abusive regime into citizens of a post-transitional state. The principle of legality is as much concerned with agents as laws. The proposed excuse recognizes a distinction between individuals acting in a private versus a public mode. Many of those who committed abuses in the past were acting in a public mode in ways that were, taking the totality of pre-transitional public conditions into account, theoretically predictable. The fact of broad complicity points out that part of the process of justice in transitions is transforming norms. The legality objection points out that most of those complicit are candidates for change.

Second, focusing on the role of public norms in abuses sets the stage for production of a full account of the past that allows a transitional movement

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220. Sub-points (4) and (5) provide for prosecution of people in special positions that require conduct above common public practice. The focus of (4) is on leaders responsible to international treaties and covenants. The interest in (5) is in individuals who have freely taken oaths of conduct that supercede their statuses as public agents.

221. De Greiff, *supra* note 62, at 93-95; cf. Ackerman, *supra* note 6, at 70-73 (distinguishing between constitutional creation and corrective justice).

222. Habermas, *supra* note 164, at 115, 171-74.

223. See Minow, *supra* note 36, at 2-5.

224. See Teitel, *supra* note 16, at 28-33.

to mark sites for change and publicly establish commitments to new norms. Proper extension of the excuse requires establishment of a clear historical record of the past to determine who should and who should not be excused and to further the necessary process of converting the old public face of law into the new. Trials, on the other hand, run the risk of neglecting the fact that there is a transition. By trying to keep transitions in the mold of stable state criminal jurisprudence, trial advocates fail to take account of the fact that transitional justice must be both prospective and retrospective in ways that stable state justice is not.<sup>225</sup>

This proposed defense invites obvious objections, particularly when it is pointed out that abuses commonly violate the most basic tenets of civilized law.<sup>226</sup> Concerns may also be raised as to the premium the excuse puts on the principle of legality. For example, consequentialists might argue for rejection or suspension of the legality principle in favor of practical goals such as deterrence and incapacitation. Parts III and IV address these concerns. Building on this discussion, Part V suggests how transitional justice procedures can be excuse centered and how this approach provides justification, support, and guidance for truth commissions.

### III. DEFENDING THE DEFENSE: OTHER SOURCES OF LAW

Part II argued against individual criminal liability in transitions by making use of the principle *non malum sine lege*, commonly called the legality principle. This position may seem unattractive for a number of reasons. For example, a natural law theorist might object, arguing that laws demand obedience as a function of their proximity to natural right; state codes inconsistent with natural law cannot demand obedience; natural law exists independently of state codes; and natural law creates direct obligations regardless of conflicting state codes.<sup>227</sup> From this, a naturalist could conclude that everyone has a standing obligation to the natural law that is not excused by interference from immoral state codes of conduct.<sup>228</sup>

This is an argument with some currency in transitional justice debates.<sup>229</sup> It was used at Nuremberg<sup>230</sup> and in the German border guard cases.<sup>231</sup> Beyond this historical significance, the basic line of response, which appeals to a source of "law" outside of state codes, can be applied to justify

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225. *Id.* at 11-26.

226. See Cassel, *supra* note 215, at 199-208.

227. See generally Thomas Aquinas, *Summa Theologica passim* (Fathers of the English Dominican Province trans., Encyclopædia Britannica 1989) (1273); 1 Blackstone, *supra* note 138, at \*1-37; Thomas Hobbes, *Leviathan* 65-78 (London, George Routledge & Sons, 2d ed. 1886) (1651).

228. Duff, *supra* note 164, at 75.

229. Teitel, *supra* note 16, at 14-15; see Peter Novick, *The Holocaust in American Life* 179, 246 (1999).

230. U.S. State Dep't, Office of Int'l Info., *The Legal Basis of the Nuremberg Trial XVIII* (1945) [hereinafter *Legal Basis of the Nuremberg Trial*].

231. *Trial of Border Guards, Berlin State Court, No. (523) 2 Js 48/90 (9/91)*, *supra* note 145, at 576, 579; Elster, *supra* note 21, at 238-39.

punishment based on, for example, international law. This section responds to this line of argument by motivating a distinction between legal culpability and moral responsibility based on epistemic duties unique to agents in their public modes. The strict liability approach to blame suggested by the appeal to natural law does not account for the role that the public face of law plays in the lives of public agents and the construction of legal blame.

### A. *Fears of Radical Skepticism*

Both for purposes of the argument and because I think it is true, I will grant that murdering thousands of innocents is wrong, even if no domestic laws recognize that it is so.<sup>232</sup> The argument for an affirmative defense does not imply that there are not higher callings than the laws on the books.<sup>233</sup> Nor does the argument in Part II imply that bad laws can demand obedience.<sup>234</sup> The focus is on the fact that the public face of law in abusive states intervenes between individuals and moral right in such a way that people living in these regimes may make mistakes about what they ought and ought not to do.<sup>235</sup> Because the source of this confusion benefits from the apparent stamp of official state approval,<sup>236</sup> is external to the agent, and is, by definition, removed in the process of transition, the legality principle points out that punishment is inappropriate. That this is so implies neither that pre-transitional abuses were right nor that those implicated did not have a duty to know better and do otherwise.

The naturalist objection is, at its core, fed by fear of a skepticism of duties to the good that the argument in this Article does not implicate. To illuminate the point it is useful to consider the full extent of the naturalist critique by way of a discussion of excuse defenses. Mistakes of fact generally provide an excuse from legal blame.<sup>237</sup> Consider, for example, a hiker who, walking through a public forest, unwittingly takes a path leading onto private property, thus committing the crime of trespass.<sup>238</sup> Unless this

232. I am hardly alone in this view. See, e.g., Dworkin, *Internal Realism*, *supra* note 133, at 2 (extending arguments appearing in Dworkin, *Objectivity and Truth*, *supra* note 133).

233. See Hart, *supra* note 141, at 617-21.

234. *Id.*; see also Plato, *Crito*, in *The Dialogues of Plato* 213 (Benjamin Jowett trans., William Benton 1989) (380 B.C.).

235. See *supra* note 216 (noting that the potential mistake here is meant to capture the limited scope of legal agency under the legality principle). As argued at greater length below, no truly reasonable moral agent could make a mistake about their duty not to perpetrate the abuses endemic to pre-transitional regimes.

236. This distinguishes the legality excuse as I am developing it from the more familiar excuse of ignorance of the law, which is not, in most circumstances, a viable defense against criminal liability, though it may mitigate culpability.

237. Ashworth, *supra* note 138, at 164-65; Hall, *supra* note 138, at 360-64.

238. This example and the argument for radical skepticism is taken from philosopher Gideon Rosen. Gideon Rosen, *Skepticism About Moral Responsibility*, 18 *Philosophical Perspectives* 295 (2004) [hereinafter Rosen, *Skepticism About Moral Responsibility*]; Gideon Rosen, *Responsibility and Moral Ignorance* (Nov. 2001) (unpublished manuscript), available

is a strict liability offense the trespasser would not, and should not, be blamed for his trespass if he both did not know and could (or should) not have known that he was walking on private rather than public land.<sup>239</sup>

The naturalist objection sees the legality defense as proposing a parity between mistakes of fact and mistakes of the good such that blameless errors of right should provide an excuse on par with mistakes of fact. The argument proceeds from the premise that blameless moral ignorance is just as possible as blameless ignorance of facts. There are really two ideas here. The first is that moral ignorance is possible. The second is that one can be blameless for these mistakes. Sincere differences in moral belief provide ample proof of the first assertion. While a relativist may look at such differences and claim that neither disputant is "mistaken," the abuses perpetrated in pre-transitional regimes provide examples of opinions that challenge the moral agnostic to stay neutral.<sup>240</sup> The more interesting issue is whether blame is appropriate when a wrongdoer acts in accord with a mistaken belief that what he is doing is right, or, at least, not wrong.

The legality excuse contends, without apparent limitation, that blame is not appropriate if bad acts are functions of social beliefs, practices, and norms. While the proposed defense is not a cultural defense there are some parallels worth considering in light of the naturalist objection. Consider, for example, a Hittite living in the Near East in 100 B.C.<sup>241</sup> The Hittite would have been shaped by the ubiquitous practice of slavery and the commonly shared belief system that made slavery a perfectly acceptable practice. He would have grown up thinking that, while it was bad to be a slave, there is nothing inherently wrong with the practice of slavery.<sup>242</sup>

Of course, it is one thing to claim that the Hittite did not know that slavery is wrong and quite another to contend that this mistake is excusable. To render the Hittite blameless for his mistake it is necessary to argue that he did not breach a duty to "rethink the non-controversial principles that form[ed] the framework for [his] relations with other people."<sup>243</sup> This added premise makes a claim about epistemic duty, what one has a duty to know in the context of norm-guided action. The legality excuse raises concerns for the naturalist because it seems to claim that duties to right end with the duty to know what public norms require, no matter how evil or misguided those norms might be. This is an uncomfortable proposition.

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at <http://www.law.nyu.edu/clppt/program2001/readings/index.html> [hereinafter Rosen, Responsibility and Moral Ignorance].

239. J.L. Austin, *A Plea for Excuses*, in 1 Aristotelian Society Proceedings LVII, at 39 (1956) (discussing the duty to take reasonable care to avoid preventable ignorance).

240. Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* 24-35 (1997).

241. This example is borrowed from Rosen, *Responsibility and Moral Ignorance*, *supra* note 238, and Rosen, *Skepticism About Moral Responsibility*, *supra* note 238, at 304.

242. The Hittite is not alone in this belief. Aristotle famously argues for slavery based on an ontology that includes natural slaves and natural masters. Aristotle, *Politics* bk. I, chs. 4-8 (W.D. Ross ed., Benjamin Jowett trans., *Encyclopædia Britannica* 1989).

243. Rosen, *Responsibility and Moral Ignorance*, *supra* note 238, at 12.



Fortunately, there are good reasons to doubt the veracity of the added premise. Specifically, it seems to miss a distinction between mistakes of fact and mistakes of right. Focusing on this distinction suggests that we may have a duty to know our epistemic duties, a duty that goes farther and is more demanding than is reflected in the quick switch from mistakes of fact to mistakes of the good. Aristotle provides just such an argument in his *Nicomachean Ethics*.<sup>244</sup>

### B. Mistakes About Particulars Versus Mistakes of the Good

In book three of *Nicomachean Ethics* Aristotle takes aim at Plato's claim that nobody does what is bad knowing that it is bad.<sup>245</sup> Plato's position is, in Aristotle's view, tantamount to thinking that evil acts are not voluntarily committed.<sup>246</sup> Adoption of such a view shatters intuitive notions of blame and praise by denying that anyone can be blamed for their evil acts. Aristotle's response attempts to reconstruct the possibility of blaming evildoers by distinguishing between mistakes of particulars and mistakes of right. Aristotle writes,

Now every wicked man is ignorant of what he ought to do and what he ought to abstain from, and it is by reason of error of this kind that men become unjust and in general bad; but the term "involuntary" tends to be used not if a man is ignorant of what is to his advantage—for it is not mistaken purpose that causes involuntary action (it leads rather to wickedness), nor ignorance of the universal (for *that* men are *blamed*), but ignorance of particulars, i.e. of the circumstances of the action and the objects with which it is concerned. For it is on these that both pity and pardon depend, since the person who is ignorant of any of these, acts involuntarily.<sup>247</sup>

On this view, ignorance that may pardon is not of right and wrong but of critical exigent facts and circumstances that thwart an individual's ability to achieve the intended consequences of her actions. Bad acts perpetrated in the fog of ignorance of particulars are excused<sup>248</sup> because the action is truly involuntary. To use one of Aristotle's examples, if Metrope had known that the figure looming in the darkness was not an enemy soldier but his son he would not have shot. Due to this mistake, Metrope cannot be said to have

244. Aristotle, *Nicomachean Ethics* (W.D. Ross ed. & trans., Encyclopædia Britannica 1989).

245. *Id.* bk. III; Plato, *Meno* \*77 c-e (W.K.C. Guthrie trans., Penguin Books Ltd. 1956) (380 B.C.). Plato's position, like the ignorance line attributed to legality above, is grounded in the claim that those who commit evil acts do so out of ignorance, simply mistaking the bad for the good. While Plato's position is much broader, in that he does not distinguish between blameless and blameworthy mistakes of right, it is analytically close enough to the legality line to make Aristotle's response worth considering in the present context.

246. This is, as we will see, importantly different from "involuntary." On Aristotle's view, involuntary acts qualify for an excuse.

247. Aristotle, *supra* note 242, bk. III, ch. 1.

248. Oliver Wendell Holmes, *The Common Law* 48 (Little, Brown and Co. 1923) (1881).

voluntarily shot his son. His involuntary mistake of fact qualifies him for pity for his mistake and the loss of his son, not blame.

Ignorance of right and wrong is, as Aristotle points out, quite different from ignorance of particulars. Failing to seek out and know the nature of good will certainly lead to bad acts due to ignorance. Unlike Metrope's mistake, however, these are errors of evaluation. Perpetrators of such acts can only be called wicked. The wicked actor intends both act and outcome, though she mistakes bad for good.<sup>249</sup> If a wicked person who has intentionally done wicked things cannot be blamed, it is hard to see who can be.

This distinction has obvious application to the proposed legality excuse. Consider the case of a Hutu who engages in genocide because he truly believes what the public face of law tells him—that the Tutsi “cockroaches” must be exterminated.<sup>250</sup> According to the foregoing discussion of legality, true believers of this ilk should qualify for an excuse because their beliefs are traceable to an abusive public face of law. On Aristotle's view, the Hutu's mistake is a mistake of evil for good. He is wicked. The wicked deserve blame, not pity. Therefore, the Hutu's ignorance does not excuse his act because the ignorance is an expression of bad character.<sup>251</sup> This claim for responsibility in transitions is bolstered by the fact that in abusive states there are those who recognize the evil around them and actively work against it.<sup>252</sup> If it is not impossible to know right from wrong in an abusive state then there seems no reason not to hold responsible and punish those who fail to live up to their ethical duty to know right from wrong.

Aristotle's arguments seem to provide grounds for a devastating attack on the excuse defended in Part II. As it stands, the legality excuse appears to shift blame for bad acts, via bad character, to an abusive public face of law. By focusing on a distinction between ignorance of particulars and ignorance of the good and corresponding differences in epistemic duty, Aristotle seems to have destroyed the premise that individuals have no duty to inquire beyond the claims of right present to them in the form of the public face of law.<sup>253</sup> Therefore, it seems appropriate to blame pre-

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249. Aristotle, *supra* note 242, bk. III, ch. 1.

250. Though contested by the defendants in the “Media Trial,” the International Criminal Tribunal for Rwanda held that “cockroach” is the appropriate translation of *inyenzi*, which was used to refer to Tutsis during the periods leading up to and including the 1994 holocaust in Rwanda. See *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR-99-52-T, Judgment ¶ 179 (Dec. 3, 2003).

251. Aristotle, *supra* note 242, bk. III, ch. 1. As a further test, Aristotle points out that “the doing of an act that is called involuntary in virtue of ignorance of this sort must be painful and involve repentance.” *Id.*

252. See, e.g., Gourevitch, *supra* note 17, at 110-44 (describing the efforts of Paul Rusesabagina, manager of the Hôtel des Mille Collines, to provide safe haven for Tutsis during the 1994 genocide).

253. A similar argument can be made from philosopher Jean-Paul Sartre's argument for radical responsibility. Jean-Paul Sartre, *Being and Nothingness* 6-12 (1956). On first flush, the excuse I have proposed may, in Jean-Paul Sartre's terms, seem like the worst sort of “bad

transitional abusers even if they act from real ignorance that corresponds to the public face of law. They are wicked, after all.<sup>254</sup>

### C. *Legality and the Epistemic Role of Law in Public Agency*

The Aristotelian/naturalist response misses the critical role that the state plays in constructing legal responsibility. In abusive regimes the public face of law is such that people can conclude that abuses are not against the law. Focusing on this suggests two responses to the natural law objection as bolstered by Aristotle's distinction. First, the state must accept some responsibility for ignorance-producing conditions under the old regime. Second, the disjunction between law and moral right highlights a distinction between private moral agency and public legal agency. Taking account of this suggests that a distinction between moral culpability and legal liability should be made in transitions.<sup>255</sup> This approach preserves the possibility of moral blame but, by forgoing legal punishment, appreciates the commitment to fair warning that girds the legality principle.

Aristotle's defense of moral responsibility comes down to an argument that we each have an unmediated duty to know our duty. While this position may be sustainable, it does not properly apply in the legal context. To see how this is so it is important to focus on the conditions that create excusable ignorance. Even for Aristotle ignorance of particulars is not a complete defense.<sup>256</sup> We each have a basic responsibility to know facts and conditions that a reasonable person in our position would know. Ignorance produced by laziness and inattention is not excusable. Agents are excused, however, for "ignorance for which they are not, themselves, responsible."<sup>257</sup> If our ignorance is a result of deception or misinformation from another source then we are not to blame when this ignorance leads us to do harm. Despite this admission, Aristotle stands by his claim that "wickedness is voluntary"<sup>258</sup> and not to be excused no matter the role that external conditions might play.

These positions may seem somewhat at odds. The solution, which is resident in Aristotle's argument, is that agents have different levels of epistemic duty with respect to particulars on the one hand and the good on the other. Specifically, what Aristotle must argue is that, as autonomous and reflective beings moral agents have the capacity and, thus, the duty to discover directly the moral truth on their own. While conditions in the world may affect moral knowledge, the external world does not mediate between agents and the good. Therefore, conditions in the world cannot waive duties to know the good.

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faith." The distinction that I press in this section, between moral responsibility and legal liability, provides a response to Sartre just as it does to Aristotle and the naturalists.

254. Primoratz, *supra* note 195, at 75-79.

255. Jaspers, *supra* note 192, at 25-27, 45-64.

256. Aristotle, *supra* note 242, bk. III, ch. 1.

257. *Id.*

258. *Id.*

Knowledge of particulars, by contrast, can only be gained through our senses. By virtue of this fact, conditions in the world directly mediate between the truth about particulars and knowledge of particulars. Agents do not, then, have exclusive control over their knowledge of particulars. In Metrope's case, for example, the play of light and shadows, conditions of the world that he could not control, led to his mistaking his son for an enemy soldier.<sup>259</sup> It follows that agents cannot be kept to the same stringent epistemic duties that hold with respect to the nature of the good. For knowledge of particulars the highest reasonable epistemic duty is the duty to take care.<sup>260</sup> For knowledge of the good the duty is absolute.

Wicked people who do wicked things should be blamed. Pre-transitional abusers, wicked people indeed, should be subject to blame. Nonetheless, they should not be subjected to legal punishment. To understand how these views are consistent it is critical to focus on the limited impact of the proposed excuse. The legality excuse does not propose to exonerate wrongdoing or to shift epistemic duties. Provision of the excuse does not imply that no wrong has been done or that those implicated in pre-transitional abuses should not have acted otherwise. It is a legal excuse derived from the failure of a regime to provide fair warning of the legal consequences of an action. The excuse focuses on the privilege to punish and the conditions that a state must meet to claim this privilege. It points out that if a state fails to meet its burden, it must forgo its privilege to punish. Pre-transitional states fail to meet burdens of fair warning. It follows that a transitional regime, as heir to the past, must provide a legal excuse for those who acted within the behavioral boundaries established by an abusive public face of law.

Responses to legality concerns that focus on individual responsibility indulge in a non sequitur. The failure of a state to fulfill the formal requirements that it must to claim the privilege to punish is separable from concerns relating to ethical duties to know right from wrong and moral obligations to act appropriately. A state's duty to inform its citizens about what the law demands also has epistemic consequences. The legality principle requires fair warning as a prerequisite to just punishment.<sup>261</sup> What the principle highlights is that, from a criminal law point of view, the state necessarily mediates between the natural law and citizens. It may be that a state that fails to conform domestic laws to the natural law does not deserve faith and respect.<sup>262</sup> It may even be true that there is no obligation to obey bad law so that state law that is contrary to the natural law cannot bind citizens.<sup>263</sup> None of this implies that a state that has propagated an abusive public face of law is entitled to punish citizens who obey just

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259. *Id.*

260. *Id.*

261. See Hall, *supra* note 138, at 58-59.

262. Fuller, *supra* note 138, at 657-61; Hart, *supra* note 141, at 618-19.

263. Hart, *supra* note 141, at 616-17.

because that law does not conform to the natural law. Such a situation would be both "brutal" and "absurd."<sup>264</sup>

The state is a conduit for knowledge of right and wrong within the pathway of criminal justice leading up to prosecution and punishment. Therefore, while citizens may have the capacity and bear the duty to know the good on an individual basis, there can be no criminal consequence for failure to fulfill this epistemic duty.<sup>265</sup> The only epistemic duty that can have criminal consequences is the duty to know what the public face of law demands.<sup>266</sup> Where, as in abusive states, the public face of law creates conditions in which people can be led to make mistakes about what is right, those who act out those mistakes cannot be held criminally accountable without violating the legality principle<sup>267</sup> because they have met their public duty to know what the law demands. They may be blamed for their moral failures, but they may not, consistent with core demands of the rule of law, be punished criminally.<sup>268</sup> Reciprocally, a regime that has enabled that mistake loses its moral entitlement to punish.<sup>269</sup>

None of this is inconsistent with praising those who rise above the abusive conditions of a pre-transitional state. We can, and should, celebrate the Oskar Schindlers of the world. That we do, however, does not require punishing those who follow the law. Legal wrong is not the same as wickedness. The state bears responsibility for defining legal wrong and for establishing conditions consistent with legal education and habituation of citizens. Given this duty, citizens in their public roles as legal agents may rely on the public face of law as the standard bearer of legal right and wrong. When the state fails to do its part, the legality principle dictates that the state must sacrifice its privilege of punishment in deference to fairness and respect for the autonomy of its citizens. For a transitional regime to do otherwise would put it in no better a moral position than its predecessor.<sup>270</sup>

The excuse proposed here is limited to legal agents in their public modes. It has no footing in and no consequences for moral agency. Moral blame may still be appropriate for the knowing commission of any act that is wrong.<sup>271</sup> A morally blameworthy act may also have legal consequences, but this need not be the case. In a similar vein, morally appropriate acts may sometimes be subject to criminal consequences. There is, as a

264. Fuller, *supra* note 58, at 59.

265. See Hart, *supra* note 141, at 619-20.

266. Consistent with this view, mistakes of law generally do not provide an excuse from legal punishment. See Holmes, *supra* note 248, at 40-41. But see Dan M. Kahan, *Ignorance of the Law Is an Excuse—But Only for the Virtuous*, 96 Mich. L. Rev. 127 (1997).

267. Hart, *supra* note 141, at 619-20.

268. The distinction proposed here between legal and moral punishment is not new. For its application in the context of transitional justice, however, credit is due to Karl Jaspers. Jaspers, *supra* note 192.

269. Fuller, *supra* note 138, at 655.

270. Fuller, *supra* note 58, at 39, 248-49; Fuller, *supra* note 138, at 655.

271. Aristotle, *supra* note 242, bk. III, ch. 1.

practical matter, no necessity in this relationship,<sup>272</sup> and therefore no legal right to punish may be drawn from morality alone.

The legality principle respects the distinction between legal and moral blame by marking a derivative distinction between individuals in their public legal modes and agents in their private moral modes. People in their roles as legal agents are operated on by the laws, which make claims on their behavior. Legal agency comes with its own obligations and epistemology. Legal punishment pursues those who fail in their duties as legal agents. Punishment is forgone when agents meet the demands placed on them in public, despite the fact that they lie to their mothers about taking the garbage out. The legality principle points out that the same argument goes for all other acts that are not prohibited under the law. Actions *mala in se*, like acts *mala prohibita*, are punishable only if prohibited by law. That they are wrong regardless of the law is beside the point.

#### D. Justification and Application

This position is consistent with a familiar distinction, made in all rule-ordered practices, between justification and application.<sup>273</sup> Games, for example, operate with a specific set of rules. From time to time some of these rules may reveal themselves to be less than ideal with respect to the greater goals of the game. Movements develop and opportunities to change the rules are presented. These opportunities are limited to times and places outside of actual games, however. Therefore, if a striker in a soccer match is called offside she might appeal the accuracy of the call but it would not be appropriate for her to appeal the fairness of the offside rule. In the game, the rules are applied. Conversations about their justification are reserved for other times and forums.

Law is similar to games in recognizing a firm distinction between justification and application.<sup>274</sup> The principle of legality is an expression of this commitment. The debate over the source of law and the legitimacy of law is part of the broader conversations that rationalize, justify, and, eventually, generate laws.<sup>275</sup> They are the sorts of conversations engaged in by legislators, policy wonks, citizens, and sometimes even philosophers, and are reserved for the senate floor, classrooms, and civil society. Fetal norms that have not completed their gestation do not, until fully mature as sanctioned law, justify punishment.

To illustrate the point, imagine that I am driving at thirty-four miles per hour ("mph") on a stretch of road that is clearly marked as a thirty-five mph zone. When pulled over and charged with speeding I contest the charge, claiming that I was within the marked speed limit. Now imagine that the

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272. See generally Hart, *supra* note 141.

273. Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics* 19-112 (Ciaran Cronin trans., 2d ed. 1995).

274. Habermas, *supra* note 164, at 115, 172.

275. *Id.*

officer agrees. He adds, however, that this is his usual patrol and he has noticed an unacceptable number of fatal accidents on this road. Furthermore, his department has conducted a study, the conclusion of which is clear: If cars traveling that stretch of road drove at twenty-five mph dozens of lives would be saved every year. Thus, he says, the speed limit really, by all measures practical and moral, should be twenty-five mph. He writes me a ticket for going nine mph over the correct—not the posted—speed limit.

Now we go to court. The officer acknowledges that I was within the posted limit, but presents the judge with the findings of the study. Intrigued, the court conducts an evidentiary hearing, finds in favor of the patrolman, and fines me for driving faster than I should have. In my appeal, my argument is clear: The judge and the patrolman overstepped their bounds. It was their job to apply the law as they found it. By overstepping, they have created a Kafkaesque world of inscrutable legal expectations.<sup>276</sup> They have also unjustly used the law to punish me for an act that was not, by definition, illegal at all.

It would still be unjust for the judge to punish me for speeding in this case if I revealed that I had read the study before that fateful evening. It would be unjust even if I agreed with the study, and thought that everyone should drive twenty-five mph. Even if all of this were true, the laws on the books set the limit at thirty-five mph. More importantly, the signs on the road clearly read "Speed Limit: 35 mph." My duty as a legal agent was, then, to respect that thirty-five mph limit. So long as I have done this, I am guilty of no legal transgression, even if, in a moment of private reflection, I agree that I should have kept it under twenty-five mph.

The same is true of someone who abided by the laws in place under an abusive regime. Brought before a transitional tribunal he rightly may claim that he was following the law at the time. It would be odd and out of place for the judge to respond by saying that those were bad laws and the defendant should have known better. Just as it is not a defense in law to claim that the law is wrong,<sup>277</sup> there cannot be a legal obligation to ignore or break laws that go against moral law. This is not to say that there is no moral obligation to disobey evil laws. As Socrates argues in the *Apology*, there is.<sup>278</sup> In a more contemporary vein, under United States law, those who claim objective fear of future persecution may not gain asylum if they participated in persecution of another,<sup>279</sup> even if under duress.<sup>280</sup> By contrast, while applicants may not normally claim fear of persecution based

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276. More than most applications, "Kafkaesque" is singularly appropriate here. In Franz Kafka's *The Trial*, the main character, K., confronts a situation similar to that which I am describing here. The duty of clear warning that is captured by the legality principle is meant to guard against the specter that Kafka constructs. See generally Franz Kafka, *The Trial* (Breton Mitchell trans., Schocken Books 1998) (1925).

277. Plato, *supra* note 234, *passim*.

278. Plato, *Apology*, in *The Dialogues of Plato*, *supra* note 234, at 200 *passim*.

279. 8 U.S.C. § 1101(a)(42) (2000).

280. *Fedorenko v. United States*, 449 U.S. 490 (1981).

on threats of lawful punishment in their home countries,<sup>281</sup> if the law violated demanded participation in persecution, then fear of punishment based on a refusal to participate can provide a basis for asylum.<sup>282</sup> This apparent disparity is explained by the fact that duress is a legal excuse, not a moral justification<sup>283</sup> and "asylee" is a moral, not legal, status.<sup>284</sup> Denial of asylum to an applicant who has, under duress, participated in the persecution of others, is acceptable because it is a function of moral culpability, not legal liability.<sup>285</sup>

Legal liability is different from moral culpability. The legality principle marks this distinction, recognizing that, while private moral considerations may be relevant to the justification of law and to private decisions to obey or not, these private reflections do not provide warrant for public sanction. Absent preexisting and legitimate, if not just, public threats, states lose their privilege to punish. None of this, as is discussed further in Part V, excludes advancement of various forms of private guilt. Nor, as is argued below, does it exclude punishment of high-level leaders.

#### *E. International Law: Distinguishing High-Level Leaders from Those Excused*

Those interested in prosecuting present-day abusers need not rely on natural law, moral law, or other abstractions. Our contemporary international human rights culture<sup>286</sup> boasts a well-stocked toolbox of treaties, charters, and jurisprudence of crimes against humanity and jus cogens law, each of which may serve as touchstones for transitional trials.<sup>287</sup> This section argues that these sources do not provide warrant to prosecute those who live under an abusive public face of law, but do provide ground for prosecuting high-level leaders exposed directly to threats of punishment under international law.

Crimes against humanity have been in the toolbox since at least the seventeenth century,<sup>288</sup> but came into prominent use at Nuremberg.<sup>289</sup> The Nuremberg Tribunals determined that unconditional surrender entitled the

281. Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 239 (2d Cir. 1992).

282. Islami v. Gonzales, 412 F.3d 391 (2d Cir. 2005); Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003).

283. Ashworth, *supra* note 138, at 195; Immanuel Kant, *The Metaphysics of Morals* \*236-38 (Mary Gregor ed. & trans., Cambridge Univ. Press 1991) (1798).

284. See Rodriguez-Majano, 19 I. & N. Dec. 811 (B.I.A. 1988).

285. Happold, *supra* note 87, at 1158-63.

286. Rorty, *supra* note 17, at 115-16.

287. Cassel, *supra* note 215, at 197 (describing the international response to human rights violations); Orentlicher, *Settling Accounts*, *supra* note 2, at 2546-96.

288. 3 Hugo Grotius, *The Rights of War and Peace* bk. III, ch. X (Richard Tuck ed., Liberty Fund 2005) (1625); Emerich de Vattel, *The Law of Nations* bk. III, chs. I & VIII (James Brown Scott ed., Charles G. Fenwick trans., Carnegie Inst. Wash. 1916) (1758); Richard Zouche, *An Exposition of Feical Law and Procedure, or of Law Between Nations, and Questions Concerning the Same* (J.L. Brierly trans., Carnegie Inst. 1911) (1650).

289. Legal Basis of the Nuremberg Trial, *supra* note 230, at XVIII.



Allies to establish criminal laws *ex post facto*.<sup>290</sup> This position, which smacks of "might makes right," is only persuasive, if at all, on a practical level. Contemporary prosecutions for crimes against humanity need not rely on this dubious ground, of course. Going forward, the Nuremberg prosecutions established the international threat of punishment for crimes against humanity.<sup>291</sup>

Appeals to crimes against humanity seem to solve legality concerns by replacing fuzzy presumptions of universal right with solid claims of international law grounded in historical events and institutions, including prosecutions at Nuremberg, the International Tribunals for the Former Yugoslavia<sup>292</sup> and Rwanda,<sup>293</sup> and, going forward, the International Criminal Court.<sup>294</sup> With slave trading and piracy, crimes against humanity also form the traditional core of universal jurisdiction,<sup>295</sup> allowing members of the international community to pursue prosecutions where transitional regimes are not able or willing.<sup>296</sup> In light of recent prosecutions, pursued by individual states<sup>297</sup> and by international tribunals, crimes against humanity appear to provide both normative justification for transitional prosecutions and a standing threat of punishment that persists where domestic laws enable abuse.

The duty and privilege of punishing crimes against humanity falls not on a particular power but on humanity as a whole.<sup>298</sup> Just as sovereign states committed to the rule of law must earn the privilege to punish, so too any authority that seeks to prosecute crimes against humanity must demonstrate that it has earned this right. Members of the international community assert the privilege based on previous enforcement efforts and on consistent defense of core human rights norms.<sup>299</sup> While compelling as a vision, this response to legality concerns fails to provide substantial ground for punishing those who live under an abusive public face of law.

The presence of crimes against humanity on the international scene does not solve legality concerns in the unique circumstances of abusive states, at least for those living under an abusive public face of law. To meet core legality concerns of clarity, regular enforcement, and fair warning, the threat of prosecution for violations of crimes against humanity must be

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290. *Id.* at XVIII.A. This response is assessed in the next section.

291. Minow, *supra* note 36, at 33.

292. Statute for the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

293. Statute of International Criminal Tribunal for Rwanda, art. 3-4, S.C. Res. 955, U.N. Doc. S/Res/955 (Nov. 8, 1994).

294. Rome Statute of the International Criminal Court, *supra* note 150.

295. Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 New Eng. L. Rev. 399, 403-06 (2001).

296. *Id.*

297. Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 Am. U. Int'l L. Rev. 301, 314-55 (2003).

298. Broomhall, *supra* note 295, at 404-405; Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev. 785, 789-90 (1988).

299. Randall, *supra* note 298, at 790; Sriram, *supra* note 297, at 301.

present to those on the ground in abusive regimes. Otherwise crimes against humanity have no more normative significance than remote laws of foreign states or laws propagated in secret. Unfortunately, for most living under pre-transitional regimes, international law, including crimes against humanity, is obscured by the local and immediate demands of an abusive public face of law.

Just as abusive regimes operate to obscure the demands of natural right, so do they hide from domestic view the threats and demands of international law.<sup>300</sup> This has two consequences: First, as heir to abusive regimes, transitional governments have no more moral authority to punish based on international law than natural law. Second, abusers living under an abusive public face of law, because they are insulated from the body of threats maintained by the international community, are not subject to the fair warning required by legality. Absent the coherent, clear warning demanded by legality, members of the international community have no better claim to punish crimes against humanity. That the failure is the regime's, rather than the international community's, is unimportant with respect to the autonomy of prospective defendants.

Leaders are situated differently. Rather than living under an abusive public face of law, high-level leaders have a duty to conform domestic law to the demands of natural right and to the core demands of international human rights law.<sup>301</sup> While failing to fulfill this duty does not give rise to individual criminal liability,<sup>302</sup> recognition of this institutional role points out the unique position of high-level leaders. As opposed to their subjects, leaders are exposed directly to the international community. They may not claim ignorance of or insulation from threats of punishment posed by prosecutions for crimes against humanity. That the vast majority of these prosecutions have focused on high-level leaders<sup>303</sup> strengthens the threat, and the point. So, while the historical fact of prosecutions for crimes against humanity does not solve legality concerns with respect to those living under an abusive regime it does provide ample authority for prosecuting high-level leaders who use their positions of authority to construct and preserve a public face of law that encourages crimes against humanity.<sup>304</sup>

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300. This point is argued at greater length in Part IV.

301. Vienna Convention on the Law of Treaties arts. 26-27, May 23, 1969, S. Exec. Doc. L. 92-1, 1155 U.N.T.S. 331, 339; International Covenant on Civil and Political Rights ("ICCPR") art. 2(2), Dec. 19, 1966, S. Exec. Doc. E. 95-2, 999 U.N.T.S. 171, 173-74; Genocide Convention, *supra* note 149, art. 5, 102 Stat. at 3045, 78 U.N.T.S. at 280.

302. Heads of state and governments, collectively, may, however, be prosecuted for criminal acts. *See generally* E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003).

303. Orentlicher, *Settling Accounts*, *supra* note 2, at 2602-03.

304. This is an established ground for criminal liability in contemporary international criminal jurisprudence. Rome Statute of the International Criminal Court, *supra* note 150, art. 7, 2187 U.N.T.S. at 93-94.

Jus cogens and international treaties face similar limitations, derived from externality<sup>305</sup> and the intervention of domestic law. In addition, they face significant jurisprudential problems. Jus cogens, “norm[s] accepted and recognized by the international community of States,”<sup>306</sup> for example, are only enforceable by states against other states and do not provide grounds for individual criminal liability.<sup>307</sup> The few international treaties that provide grounds for individual liability usually require domestic execution. While it is argued that some treaties are not so limited,<sup>308</sup> this is a contested view,<sup>309</sup> diffusing any clear warning that the Convention on the Prevention and Punishment of the Crime of Genocide, for example, might provide for those living within the dense folds of an abusive regime. Regardless, like domestic laws against murder, even self-executing treaties are obscured in pre-transitional regimes by an abusive public face of law.

By contrast, high-level leaders in abusive regimes have good reason to question their commitments to death and destruction. Since 1948 most countries, including most abusive regimes, have made formal commitments to refrain from atrocities by becoming parties to the Universal Declaration of Human Rights and other treaties and conventions.<sup>310</sup> In addition to these documents, leaders have become regular targets for prosecutions based on transgressions of international law.<sup>311</sup> These commitments and events provide the elite with adequate warning that they may be subjected to prosecution under international law. This warning, unique to the normative and phenomenal positions of high-level leaders, resolves legality concerns, which counsel against prosecutions directed against those who live under an abusive public face of law.

The significance of the distinction between subjects and sovereigns is amplified by abusive regimes’ frequently autocratic nature. There are relatively few people in influential decision-making roles responsible for advancing institutional programs of abuse.<sup>312</sup> Moreover, those most responsible are often identifiable by the fact that they have authored and executed the key elements of an abusive public face of law.<sup>313</sup> Having done

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305. Sriram, *supra* note 297, at 313-23, 374-400.

306. Vienna Convention on the Law of Treaties, *supra* note 301, art. 53, S. Exec. Doc. E 95-2 at 24, 999 U.N.T.S. at 171; *see also* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, Law & Contemp. Probs., Autumn 1996, at 63.

307. Restatement (Third) of the Foreign Relations Law of the United States § 404 (1987); Randall, *supra* note 298, at 787-88.

308. Orentlicher, *Settling Accounts*, *supra* note 2, at 2553.

309. Georg Schwarzenberger, *The Problem of an International Criminal Law*, in *International Criminal Law* 3, 10, 16 (Gerhard O. W. Mueller & Edward M. Wise eds., 1965).

310. A list of these treaties with updated lists of their signatories and parties is available at Multilateral Treaties Deposited with the Secretary General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp> (last visited Mar. 21, 2006).

311. *See, e.g.*, Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR-99-52-T, Judgment & Sentence, ¶¶ 5-10 (Dec. 3, 2003).

312. Orentlicher, *Settling Accounts*, *supra* note 2, at 2601-03.

313. *See id.*

so, leaders in these positions cannot use as a shield the sword that they have forged.

#### IV. DEFENDING THE DEFENSE PART TWO: CONSEQUENTIALIST RESPONSES AND LEGALITY

Until now this Article has focused on deontological issues. This discussion has largely ignored approaches to the problem of just punishment that focus not on abstract principles but on the achievement of social goals, such as prevention of crime. In this consequentialist world it might be argued that the principle of legality can and should be rejected or modified if it interferes with the efficient achievement of these goals.<sup>314</sup> This part argues that these concerns suggest a program of limited prosecutions focused on high-level leaders.

Consequentialist approaches to criminal punishment are goal-oriented.<sup>315</sup> For the most part they are, as Professor Nigel Walker puts it, reductive: They seek to reduce crime. There are, in the traditional literature, five main services that trials and punishment provide to this end:

1. Deterring the offender with painful memory of prior punishment
2. Deterring others by using the punished as an example
3. Reforming the offender so that she is less inclined to commit crimes
4. Educating the offender and the public to take a more serious view of the criminal act
5. Protecting the public by incapacitating the offender<sup>316</sup>

These justifications are replicated in transitional justice debates. For example, Professor Douglass Cassel defends domestic and international criminal trials to deter potential human rights violators.<sup>317</sup> Others argue that trials carry transition forward,<sup>318</sup> demonstrate public commitments to democracy and the rule of law<sup>319</sup> and thereby prevent further human rights abuses.<sup>320</sup> In addition, incapacitation may justify punishment to prevent future abuses or counterrevolution.

The sections below argue that consequentialist goals of incapacitation and deterrence do not support the use of criminal trials in transitions, at

314. I am in debt to Richard Kraut for his vigorous pursuit of this critical line.

315. Plato, *Protagoras* \*324a-b (C.C.W. Taylor, trans., Clarendon Press 1976).

316. Nigel Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* 26-27 (1980).

317. Douglass W. Cassel, Jr., *International Truth Commissions and Justice*, in 1 *Transitional Justice*, *supra* note 25; Cassel, *supra* note 215, at 197-98; *see also* Orentlicher, *Settling Accounts*, *supra* note 2, at 2542.

318. Teitel, *supra* note 16, at 11-67, 213-28; Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *Yale L. J.* 2009 (1997).

319. Orentlicher, *Settling Accounts*, *supra* note 2, at 2542.

320. *See* M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, *Law & Contemp. Probs.*, Autumn 1996, at 9, 18-22.

least for those who qualify for the proposed affirmative defense. Remote threats of punishment are unlikely to deter most pre-transitional abusers, who live under the immediate control of an abusive regime and an abusive public face of law.<sup>321</sup> Further, given shifts in law occasioned by transition, most pre-transitional abusers are best treated as candidates for change. For those who are not, transitional regimes have authority to punish post-transitional crimes. Consistent with Part II, this part argues that high-level leaders and others with direct exposure to the international community may be punished to deter those in similar positions in other abusive regimes. Though I continue to argue against broad prosecutions, I leave room for procedural approaches that focus on reform and rehabilitation by arguing that most pre-transitional "offenders" are candidates for participation in the broader reforms that constitute transitions. Pursuit of reform and reintegration come at the price of withdrawing the threat of punishment in most cases, however. The part concludes that, by coordinating limited trials and truth-seeking procedures, it is possible to avoid most of the dangers of uncritical, de facto amnesties while securing efficiently the transitional benefits that advocates hope to achieve through criminal trials and punishment.

#### A. Detering Future Human Rights Abuses

Deterrence theories focus on the decision-making processes of prospective criminals.<sup>322</sup> Transitional trials motivated by deterrence attempt to create an environment in which the balance of threatened punishment and provisional benefits tilts firmly against abuses.<sup>323</sup> Transitional trials may also hope to deter by publicizing the facts of past abuses,<sup>324</sup> lifting the veil of secrecy upon which abusers frequently rely.<sup>325</sup> Finally, trials may hope to deter other potential human rights abusers abroad.<sup>326</sup> The deterrent effect of truth and punishment on the international scene is a central argument in favor of an international criminal court and for international jurisdiction.<sup>327</sup>

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321. Kant, *supra* note 283, at \*236-38; Aukerman, *supra* note 4, at 67.

322. Cesare Beccaria, *On Crimes and Punishments* (1963); Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. Pa. L. Rev. 949 (1966).

323. Cassel, *supra* note 215, at 215-17; Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 Hum. Rts. Q. 1, 8-10 (1990). Professor Jaime Malamud-Goti rejects this strategy in *Game Without End: State Terror and the Politics of Justice*, *supra* note 29.

324. Cassel, *supra* note 317, at 78.

325. Van Zyl, *supra* note 5, at 662.

326. This was an argument made in favor of prosecuting Augusto Pinochet. See Lorna McGregor, *Military and Judicial Intervention: The Way Forward in Human Rights Enforcement?*, 12 Ind. Int'l & Comp. L. Rev. 107, 117 (2001); Amnesty Int'l, *United Kingdom: The Pinochet Case—Universal Jurisdiction and Absence of Immunity for Crimes Against Humanity*, AI Index EUR 45/01/99, 20, Jan. 1, 1999 (listing trials in France, Switzerland, Belgium, and Spain).

327. Orentlicher, *Settling Accounts*, *supra* note 2, at 2542-43.

This section makes two main arguments against transitional trials as a deterrent strategy. First, criminal prosecutions are theoretically and practically unlikely to provide significant deterrent effect against future institutionalized human rights abuses.<sup>328</sup> Second, to the extent future abuses can be deterred, transition itself, including shifts in social norms and public threats, provides sufficient threat to prevent future abuses. The force of this argument is derived from the contention that deterrence justifications, though initially appealing, fail to take account of pre-transitional conditions, the places of individual abusers in pre-transitional states, and the impact that transitions themselves may be expected to have on victims and abusers.

Jeremy Bentham described the concept behind deterrence theory, often called the "classic school" of criminology, thusly:

Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to draw him, as it were, from the commission of that act. If the apparent magnitude, or rather value, of the pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it. The mischief which would have ensued from the act, if performed, will also by that means be prevented.<sup>329</sup>

The concept is not difficult to grasp. If the consequences of an action are more bad than good for an agent, then she will refrain. Deterrence as a justification of and goal for public policy is somewhat more complex, of course. Bentham's formula simplifies the conditions in which crimes are committed, and the subjective positions of criminals.<sup>330</sup> It presumes that potential criminals are rational utility maximizers.<sup>331</sup> It also assumes a single, identifiable, and univocal punitive authority.<sup>332</sup> It further assumes that the authority's demands can be and are clearly communicated to agents.<sup>333</sup> Finally, it simplifies the concept of "consequences," which is quite complicated, involving calculations of severity, risk of detection, and probability of punishment after detection.<sup>334</sup> All of these considerations make the deterrence thesis much more complex than it first appears. To measure the potential of criminal trials in transitions to prevent future abuses of human rights it is necessary to expose and investigate these complexities.

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328. Aukerman, *supra* note 4, at 66-67.

329. *Introduction*, *supra* note 197, at 396.

330. Nigel Walker, *Why Punish?* 13-18 (1991).

331. *Principles*, *supra* note 197.

332. T. Mathiesen, *General Prevention as Communication*, in *A Reader on Punishment* 221, 231 (R.A. Duff & David Garland eds., 1994).

333. *See id.* at 321-22.

334. Aukerman, *supra* note 4, at 64. In formulaic terms: deterrence = severity of consequence  $\times$  (risk of detection  $\times$  risk of conviction). I am in debt to Judge Richard Posner for deriving this formula.

Deterrence theory makes law and criminal punishment a strategic game between rational agents disposed to maximize the possibility of benefit and minimize the risk of harm.<sup>335</sup> The game leaves open the question of players' identities, however. In transitions the subjective conditions that affect participation in deterrence games are more numerous and the possible identities of players more diverse than in stable states.<sup>336</sup> Deterrence advocates usually fail to take proper account of these added complexities. Yet it is essential to be clear about who is deterring whom to understand the dynamic relationships in the game.<sup>337</sup> Absent this, the hopeful claims of deterrence are too abstract to justify criminal punishment in transitions given the significant costs of trials in respect of other transitional goals.

### B. *A Three-Dimensional Analysis of Deterrence in Transitions*

This section describes a three-dimensional model of deterrence in transitions, taking account of those who might be deterred, their subjective motivations, and the source of deterrent threats. The next section argues, based on this model, that only high-level leaders provide reasonable objects for deterrence in transitions.

#### 1. The First Dimension: Objects of Deterrence

In traditional deterrence theory, punishment is designed to have either an individual or a general deterrent effect.<sup>338</sup> In the former, punishment tries to imprint the cost of crime on the criminal herself, using her memory of the punishment to deter her from committing future crimes.<sup>339</sup> General deterrence hopes that public punishment of criminals will put fear in the hearts of others and thereby prevent them from breaking the law.<sup>340</sup> In transitions, advocates also justify punishment as a tool for preventing counterrevolutions<sup>341</sup> by marking a change in the public face of law, deterring those who oppose transition.<sup>342</sup> Punishment also aspires to create an environment of accountability where before there was impunity.<sup>343</sup>

335. See generally Becker, *supra* note 197, at 169; *Introduction*, *supra* note 197, at 86-91; *Principles*, *supra* note 197, at 365; Posner, *supra* note 197.

336. See Jon Elster, *Coming to Terms with the Past: A Framework for the Study of Justice in the Transition to Democracy*, 39 *Européennes de Sociologie* 7, 37 (1998) (Fr.).

337. See J.Q. Wilson, *Penalties and Opportunities*, in *A Reader on Punishment*, *supra* note 332, at 177, 187.

338. Johs Andenaes, *General Prevention—Illusion or Reality?*, 43 *J. Crim. L., Criminology & Police Sci.* 176 (1952); Andenaes, *supra* note 322, at 949.

339. N. Walker, *Reductivism and Deterrence*, in *A Reader on Punishment*, *supra* note 332, at 212.

340. For a vivid account of this theory in action see Foucault's description of the drawing and quartering of a "regicidaire" in *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans., 1979). The theme of deterrence by raw fear and spectacle is repeated in more detail in "The Spectacle of the Scaffold." Foucault, *supra*, at 128.

341. See also Aukerman, *supra* note 4, at 65.

342. Orentlicher, *Settling Accounts*, *supra* note 2, at 2542.

343. *Id.*

Individual transitions to democracy are not isolated. They are part of broader efforts to establish and extend a human rights culture.<sup>344</sup> Punishing in a particular transition may, then, have a "super-general" deterrent effect, discouraging current or prospective abusers in other states.<sup>345</sup> Of course, to make the case for punishment on the basis of a "super-general" deterrence effect there must be compelling reason to believe that a domestic spectacle will reach across lines of history, culture, and nationality. If this hope is too thin then advocates must accept limitations on trials derived from other practical and moral considerations.

## 2. The Second Dimension: Sources of Deterrence

Transitions leave open the question of who should take responsibility for creating the deterrent threat.<sup>346</sup> In stable states the answer is obvious: The right of punishment is reserved for a sovereign authority.<sup>347</sup> In transitions the candidates are more numerous, including an outgoing government, a provisional government or successor regime, the United Nations, regional transnational organizations,<sup>348</sup> special tribunals, and a permanent international criminal court. More recently, third party states have also made efforts to conduct trials. Spain's attempt to extradite Augusto Pinochet on charges of crimes against humanity is, perhaps, the most notorious;<sup>349</sup> but Belgium was the first to enjoy contemporary success in these endeavors, when, in 2001, several individuals connected to the 1994 Rwandan massacre were convicted in Belgian courts.<sup>350</sup>

These possibilities suggest nine model cases that deterrence advocates might have in mind when they call for trials in transitions:

1. Domestic enforcement agents use punishment of individual abusers to deter those same abusers from committing future abuses.
2. International and transnational agents use punishment of individual abusers to deter those same abusers from committing future abuses.

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344. Rorty, *supra* note 17, at 115.

345. Cassel, *supra* note 215, at 205-15; see also Jennifer L. Balint, *The Place of Law in Addressing Internal Regime Conflicts*, Law & Contemp. Probs., Autumn 1996, at 103.

346. There are, of course, related questions as to who has the authority to carry out or demand trials in a particular transition. These questions are beyond the immediate scope of the present discussion.

347. Kant, *supra* note 283, at \*331-32.

348. The Organization for African Unity, for example, has a permanent human rights enforcement arm, the African Commission on Human and Peoples' Rights, though it lacks formal enforcement power. African (Banjul) Charter on Human and Peoples' Rights, art. 45, adopted June 27, 1981, 21 I.L.M. 58.

349. See Amnesty Int'l, *supra* note 326, for both a description of the case and a normative argument for the prosecution.

350. Marlise Simons, *An Awful Task: Assessing 4 Roles in Death of Thousands*, N.Y. Times, Apr. 30, 2001, at A3.



3. Foreign governments use punishment of individual abusers to deter those same abusers from committing future abuses.
4. Domestic enforcement agents use punishment to deter generally future abusers in the domestic sphere.<sup>351</sup>
5. International and transnational agents use punishment to deter generally future abusers in the domestic sphere.
6. Foreign governments use punishment to deter generally future abusers in the domestic sphere.
7. Domestic enforcement agents use punishment to deter generally present and future abusers in the international sphere.
8. International and transnational agents use punishment to deter generally present and future abusers in the international sphere.
9. Foreign governments use punishment to deter generally present and future abusers in the international sphere.

Punishing agents need not confine themselves to one object population. The International Criminal Court, for example, might hope to deter specific domestic agents, the general domestic population, and the general population in other nations. Neither is it necessary that one agency take responsibility for trying and punishing all candidates for justice.<sup>352</sup> The categories are not exclusive.

### 3. The Third Dimension: Subjective Dispositions of Those Deterred

Though they add some depth to an understanding of punitive relationships in transitions, these nine models leave out the most significant dimension of analysis. Abusers are not faceless agents who have indistinguishable attitudes and occupy identical positions. Abusive regimes present a broad spectrum of abusers, running from dedicated leaders, to enthusiastic followers, to those who abuse only to save themselves. It is worth distinguishing five groups in particular:

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351. By "domestic sphere," I mean the political and physical world within the sovereign control of a transitioning state.

352. The possibility of multiple agencies conducting trials raises unique equitable and procedural concerns. See Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. Int'l L.J. 163 (2000) (providing a comparative analysis of the ICTR and Rwandan domestic trials and documenting procedural and substantive abuses in the latter); Amnesty Int'l, *Rwanda: Unfair Trials: Justice Denied*, AI Index AFR 47/08/97, Apr. 8, 1997 (documenting due process and human rights concerns at all levels of the domestic trial process in Rwanda). While not insurmountable, these additional worries must be part of the calculus.

1. Leaders motivated by deep political or ethical convictions tied to an institutionalized worldview.<sup>353</sup>
2. Leaders motivated by personal interest and ambition.<sup>354</sup>
3. Followers motivated by deep political or ethical convictions tied to an institutionalized worldview.<sup>355</sup>
4. Followers motivated by personal interest or ambition who take advantage of conditions under the abusive regime (opportunists).<sup>356</sup>
5. Abusers motivated by physical or social pressures, including threats of harm and pressure from peers to conform.<sup>357</sup>

The primary reason for adding this dimension is to point out that abusers have different orientations to abuse. Deterrence theorists often are accused of falsely presuming that criminals are no more than interest calculators.<sup>358</sup> While this objection is overstated, the underlying point, that the position and orientation of actors is a factor in their relation to crime and deterrent threats, is significant.<sup>359</sup>

With this three-dimensional model in view the next sections argue that most individuals who commit human rights abuses are unlikely to be reached by general deterrence strategies, with the exception of leaders directly exposed to the international sphere. For most others, punishment

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353. This is how Daniel Jonah Goldhagen wants his readers to think of the perpetrators of the Holocaust who were "Germans first." Goldhagen, *supra* note 17, at 6-7. Hitler would certainly fit this category, as would Stalin and some Hutu Power leaders in Rwanda.

354. This category is designed to encompass individuals who participate in abuse to advance their careers, and individuals who take advantage of the vulnerability of victims to achieve more immediate personal and material goals. Leader of the Revolutionary United Front in Sierra Leone, Foday Sankoh, and former Liberian President Charles Taylor are examples of those who might fall within this category.

355. This category is designed to encompass true believers, such as members of the Rwandan *interahamwe*, members of the East German Stazi, junta followers in Argentina, and members of the German SS.

356. Elster, *supra* note 21, at 110-11. This includes Germans and Lithuanians who participated in the maintenance and cleansing of the ghettos, art collectors who purchased works taken from Jews during the Holocaust, industrialists who took advantage of slave labor, and international financial institutions that profit from abuses.

357. Examples of this category are common in Kosovo, Bosnia, East Timor, and Rwanda, where direct threats to personal safety and family were common tools used to recruit and retain abusers. This category also includes those affected by the upside-down world of praise and blame that characterizes abusive regimes. See, e.g., Malamud-Goti, *supra* note 29 (discussing the role that institutional praise for human rights abuses that characterized military culture in Argentina during the 1970s and early 1980s played).

358. James Q. Wilson, *Thinking About Crime* 118-21 (2d ed. 1983).

359. See generally Wilson, *supra* note 337 (arguing that most criminals, particularly repeat offenders and "career criminals," are rational in their decision making). Professor James Q. Wilson also points out that criminals' decisions may appear irrational to law-abiding citizens, but that this is due to a disparity in information about the real risks of crime. Law-abiding citizens tend to inflate the risks of being caught and punished. *Id.* For a more general survey of literature on the rationality of criminals, see David J. Pyle, *The Economics of Crime and Law Enforcement* 29-62 (1983) (describing econometric studies).

does not promise a significant benefit beyond the preventive and deterrent effects of transitional changes to the public face of law. Together these arguments lead to a vision of limited trials that is consistent with the excuse-centered approach advanced in Part II.

### C. *The Limited Prospects of General Deterrence from Transitional Trials*

Deterrence is forward looking, designed to inhibit persons from choosing<sup>360</sup> criminal activity in the future by imposing costs on criminal activity sufficient to outweigh benefits.<sup>361</sup> Deterrence presumes that criminals make rational cost-benefit choices.<sup>362</sup> This general conception of agency has some currency in common sense and in jurisprudential theories advanced by eminent philosophers from Bentham<sup>363</sup> through philosopher Cesare Beccaria,<sup>364</sup> philosopher John Stuart Mill,<sup>365</sup> Holmes,<sup>366</sup> and Hart,<sup>367</sup> to contemporary proponents of rational choice theory<sup>368</sup> and law and economics.<sup>369</sup> Intuitively it seems that we are inclined to do that which benefits us and disinclined to do that which does not.<sup>370</sup> Even granting this, however, it does not follow that everyone works this way in all circumstances.

One common critique of the deterrence theorist's model of agency is that it fails to take account of crimes of passion.<sup>371</sup> Crimes of passion pose a problem for deterrence in two ways. First, passionate criminals do not act out of a fully rational state and are unlikely to be swayed by remote threats of deterrence.<sup>372</sup> Thus, policies focused on general deterrence are unlikely

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360. One of the most common arguments against capital punishment as a deterrent contends that most murderers do not, in fact, act reasonably. *See, e.g.,* David A. Conway, *Capital Punishment and Deterrence: Some Considerations in Dialogue Form*, in *Punishment* 261, 264-65 (A. John Simmons et al. eds., 1995).

361. Posner, *supra* note 197, at 1205-14.

362. I do not want to commit myself to the view that instrumental reason is the only function of our rational faculties. Kant, among many others, has argued, quite persuasively, that we have faculties for practical as well as instrumental reason. Kant, *supra* note 283, at \*211-14. For the present, however, I am staying on consequentialist ground.

363. *Introduction*, *supra* note 197, at 86; *Principles*, *supra* note 197, at 365.

364. Beccaria, *supra* note 322.

365. John Stuart Mill, *On Liberty* 59 (Gertrude Himmelfarb ed., Penguin Books 1989) (1859); John Stuart Mill, *Utilitarianism* (William Benton ed., Encyclopædia Britannica 1989) (1861) [hereinafter Mill, *Utilitarianism*].

366. Holmes, *supra* note 248, at 34-62.

367. Hart, *supra* note 155; Hart, *supra* note 198; Hart, *supra* note 141, at 593.

368. Anthony Downs, *An Economic Theory of Democracy* 5 (1957); Jon Elster, *Rational Choice* 1 (1986).

369. Pyle, *supra* note 359, at 29-62; Posner, *supra* note 197, at 1193.

370. Mill, *Utilitarianism*, *supra* note 365, at 445-46.

371. Primoratz, *supra* note 195, at 38.

372. *See* Walker, *supra* note 330, at 16; Andrew Ashworth, *Deterrence*, in *Principled Sentencing: Readings on Theory and Policy* 44, 50 (Andrew von Hirsch & Andrew Ashworth eds., 1998). *But see* Posner, *supra* note 197, at 1223. Posner argues that crimes of passion should be more severely punished to overcome strong temptation—this response misses the point, of course, which is that threats of punishment, no matter how severe, are

to reduce crimes of passion. Second, passionate criminals, and particularly murderers, are unlikely to repeat their crimes, so punishment serves no individual deterrent purpose.<sup>373</sup>

In pre-transitions, "true believers," committed to the ethical, political, and cosmological visions constitutive of an abusive public face of law, commit most atrocities<sup>374</sup> and do so with the most enthusiasm.<sup>375</sup> The fact that many pre-transitional acts reflect passionate commitments raises serious concerns for the prospects of deterrence in abusive regimes.<sup>376</sup> Like passionate criminals, true believers caught up in the fervor of mass violence are unlikely to be affected by remote threats, particularly when the prevailing public face of law supports the view that what they do is necessary and right.<sup>377</sup>

Not all crimes are crimes of passion, of course. One might wonder why, then, the presence of laws and law enforcement do not deter all criminals in stable states. One possibility is that criminals are "broken," or at least significantly enough unlike the rest of us to act like they are.<sup>378</sup> In cases of those with psychopathological and socio-pathological tendencies this may be true, at least to some degree.<sup>379</sup> But even sociopaths have sufficient interest in their own pain and pleasure to allow decision making consistent with the vision of rational agency critical to deterrence.<sup>380</sup> The same can be said of many, if not most, perpetrators of large-scale human rights abuses. Referring to the model outlined above, true believers, opportunists, careerists, and even those under physical or psychological duress, all make rational choices, though we may fail to fathom their logic.<sup>381</sup> There is, then, promise that threats of punishment might tip the scales.

One might also speculate that criminals are different from law-abiding citizens in ways that inoculate them against the deterrent forces of criminal law. For example, noncriminals are predominately more risk averse than criminals, and are apt to inflate or take more seriously threats of punishment.<sup>382</sup> Noncriminals are also more concerned with public stigma

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not sufficiently present in the minds of passionate offenders to produce deterrent effects. As Posner notes, these concerns do not diminish incapacitation justifications. *Id.*

373. Packer, *supra* note 138, at 52-53.

374. See Rorty, *supra* note 17, at 112-16.

375. *Id.*; see also Goldhagen, *supra* note 17, at 49-163 (arguing that the pervasive anti-Semitic culture that prevailed in Germany during the period leading up to the Holocaust provided Adolf Hitler with "willing executioners.")

376. Aukerman, *supra* note 4, at 68-69.

377. See Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 Emory L.J. 205, 210 (2000); Sriram, *supra* note 297, at 394.

378. Wilson, *supra* note 337, at 177-78.

379. Posner, *supra* note 197, at 1223-25 (arguing that under a deterrence view, insanity defenses should be limited to a limited class of "undeterrables").

380. *Id.*

381. See generally Goldhagen, *supra* note 17, at 164-202; Rorty, *supra* note 17, at 112-15.

382. See generally Posner, *supra* note 197, at 1193; Wilson, *supra* note 337, at 189.

and personal guilt than are many criminals.<sup>383</sup> Again, that this may be so does not require wholesale rejection of deterrence theory. To the contrary, it proves the broad success of deterrence. Without any threat, more people might be criminals.<sup>384</sup> Law breakers and recidivists may simply have a higher deterrence threshold or they may not be in a position to appreciate deterrent threats. Either way, the fact of crime does little to disprove the deterrent effect. Even the most criminally inclined are unlikely to commit a crime if they know they will be caught and punished. This discussion has interesting consequences for deterrence in transitions.

Many pre-transitional abuses are perpetrated by true believers who act from conviction.<sup>385</sup> True believers do not weigh threats of punishment in the same way as stable state criminals. They are motivated not by the prospect of immediate gain, but by a desire to bring about a specific vision of the world as it ought to be.<sup>386</sup> These are goals worth killing and dying for. A remote threat of criminal sanction is unlikely to be weighed conclusively in the mind of such agents. In fact, rather than deterring, policies of punishment, whether international or domestic, often strengthen the commitments of true believers, deepening the damaging effects of the oppositional logic that sustains abusive regimes.<sup>387</sup>

Of course, true believers are not the only perpetrators of pre-transitional abuse. There are those who abuse under physical, psychological, or social duress.<sup>388</sup> These agents, though more risk averse than true believers, already are acting out of a risk assessment that reasonably and predictably puts a priority on present and immediate threats over remote threats of possible future punishment. In general, agents who act under duress are unlikely to be deterred by exogenous threats of future punishment.<sup>389</sup>

Abusers who act out of ambition or purely private motives may be more likely to feel the threat of deterrence. Corporate agents and businesses are a good example of risk-averse groups that may take a longer view of their actions in abusive regimes.<sup>390</sup> The threat of future sanction might provide sufficient threat to deter generally opportunists if they have significant exposure to the international community and the threats posed by domestic and international prosecutions.<sup>391</sup> High-level leaders, international

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383. Wilson, *supra* note 358, at 28-29 (describing the effects of social standards on law-abiding citizens).

384. This point is often made in the context of debates about the death penalty. *See, e.g.,* Conway, *supra* note 360, at 264-65.

385. Elster, *supra* note 21, at 139; Rorty, *supra* note 17, at 112-16.

386. *See* Elster, *supra* note 21, at 139 (discussing Heinrich Himmler's preference for "fanatics," who were not motivated by desire for personal benefits).

387. Malamud-Goti, *supra* note 29, at 83-91; *see also* Elster, *supra* note 21, at 93.

388. Gourevitch, *supra* note 17, at 96, 249; Minow, *supra* note 36, at 35-36; Happold, *supra* note 87, at 1163.

389. Aukerman, *supra* note 4, at 67.

390. *Cf.* Levmore, *supra* note 171, at 1657 (discussing conventional views and values of certainty and reliance that are hostile to explicitly restorative laws).

391. One might hope that banks, for example, will be less likely to support abusive states after recent lawsuits brought against Swiss banks by holocaust victims. *See* Elizabeth J.

corporations, and international financial institutions provide the most promising targets.<sup>392</sup>

The same is not obviously true of domestic agents living under an abusive public face of law. They have a narrower view of the world, limited to the reality projected by an abusive regime. Remote future threats are unlikely to dissuade most such agents. More importantly, these are individuals best viewed as candidates for change. Those who are not will identify themselves by attempting new crimes, solving selectivity problems, and avoiding legality concerns.

#### D. Identification Concerns and the Limited Prospects of General Deterrence

The receptiveness of potential abusers does not determine entirely the effectiveness of deterrence, of course. General deterrence is a function of how present threats are in the minds of those living in abusive regimes. Certainty, not severity, is the engine of deterrence.<sup>393</sup> Without sufficient risk of detection and conviction, even the most severe punishment will fail to deter. In light of the unique conditions of abusive regimes, threats of punishment are too ephemeral, distant, and temporally remote to provide the degree of certainty necessary to offset motivations provided by an abusive public face of law.

To be deterred, prospective abusers must identify with those punished. If they can distinguish themselves and their situations then they are unlikely to feel the threat of punishment and, thus, unlikely to restrain themselves out of fear.<sup>394</sup> The three-dimensional model of abusers described above indicates that punishing abusers from one category will fail to provide a general deterrent effect across categorical lines. For example, there is no reason to think that punishing leaders and intellectual architects will deter on-the-ground abusers.<sup>395</sup> Likewise, punishing active abusers is unlikely to deter passive opportunists.

The problems presented by deterring across classes are common to all categories identified above. Whether the punishing authority is a transitional regime, an international organization, or a foreign state, potential abusers will not feel threatened by punishments applied to characters playing different roles. To the contrary, those who might feel some empathetic connection to former Serbian president Slobodan

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Cabreser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 Vand. L. Rev. 2211, 2237-38 (2004). But see Saul Levmore, *Speculating Law: Beyond Cigarettes and Swiss Banks*, 52 Ala. L. Rev. 639, 647-48 (2001) (noting that disgorgement may not discourage future bad behavior).

392. See Malamud-Goti, *supra* note 29, at 10 (stating that legal disincentives to commit crimes are likely to be effective only against high-level leaders in the military).

393. Beccaria, *supra* note 322, at 68; Andenaes, *supra* note 322, at 949 (citing studies throughout the article).

394. Malamud-Goti, *supra* note 29, at 9-10.

395. See *id.* at 10; Aukerman, *supra* note 4, at 67.

Milosevic, say, would more likely be motivated to reduce their apparent responsibility by creating a shield of plausible deniability or by spreading responsibility<sup>396</sup> than to refrain from pursuing ideologically motivated programs of abuse.<sup>397</sup>

Taking account of these concerns seems to argue in favor of broader, more inclusive, prosecutorial strategies that capture the attention of all prospective abusers. As is pointed out above, however, it is simply impossible for transitions to prosecute everyone who has had a hand in pre-transitional abuses. Some selections must be made. To both meet this constraint and avoid the difficulties of cross-class deterrence a transition might elect to prosecute representatives from each category.<sup>398</sup> While this inverted class action approach has some immediate appeal, it fails to address certainty concerns. The "cross-class" problem points out that transitional trials and punishments cannot provide substantial certainty of punishment. Total immunity of a class of bad actors fails utterly to deter because it leaves members of that class certain that they will not be punished. Symbolic punishment of a few members of a class that may number in the millions fails to deter because it does not provide the necessary degree of certainty.<sup>399</sup>

Unlike cross-class concerns, risk problems derived from intra-class selectivity do not affect all abuser categories equally. Selectivity concerns counsel against picking punitive projects that cannot be completed.<sup>400</sup> By contrast, projects that can be completed may provide sufficient promise of deterring those similarly situated in other regimes.<sup>401</sup> These considerations recommend prosecutions focused on high-level leaders.<sup>402</sup> Leaders comprise a group sufficiently small to allow complete, and therefore effective, deterrence programs.<sup>403</sup> Leaders exposed to the international sphere also have more perfect information, enhancing their subjective exposure to threats from international trials. Programs that focus on top leaders therefore provide real hope of creating productive individual and general deterrence effects, particularly if pursued through persistent international enforcement regimes.<sup>404</sup>

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396. See, e.g., Gourevitch, *supra* note 17, at 96 ("If everybody is implicated, then implication becomes meaningless.").

397. This is, in part, due to the unique motivations and subjective positions of pre-transitional abusers, and particularly true believers discussed above.

398. I am in debt to van Zyl for sharing with me this argument for "horizontally-limited" trials.

399. Andenaes, *supra* note 322, at 960-73 (discussing the coordinated role of severity and risk in the deterrence effect); Aukerman, *supra* note 4, at 67.

400. De Greiff, *supra* note 6, at 81-82.

401. See van Zyl, *supra* note 5, at 665-66 (discussing the importance, as well as the difficulties, of prosecuting human rights abuses).

402. Malamud-Goti, *supra* note 29, at 8-10.

403. *Id.*

404. See van Zyl, *supra* note 5, at 665-66 (discussing the usefulness and the difficulties of prosecuting military and political leaders).

*E. Proximity Concerns and the Limited Prospects of Deterrence*

Ignorance and uncertainty, along with delay and debates about the rationality of criminals, form the core of stable state contests about deterrence.<sup>405</sup> The foregoing discussion of the subjective orientations of pre-transitional abusers to their bad acts substantially increases these concerns in the transitional context. Failures to communicate derived from isolation and ignorance further diminish the possibility that a general deterrence effect can affect institutional violence in abusive states.

In stable states legislatures and judges do not have direct lines of communication with prospective criminals.<sup>406</sup> This allows criminals and potential criminals to discount or misunderstand the possible costs of their crimes.<sup>407</sup> In the transitional context these problems are magnified. If domestic authorities are conducting trials then deterrent threats postdate abuses. With respect to past wrongs, then, trials serve no deterrent purpose at all. If transition itself can prevent future domestic abuses then there is no reason to conduct domestic trials to deter domestic abuse.

Domestic trials designed to produce a general deterrence effect in other countries are equally unpromising. Though the threat derived from a previous transition in country *A* is prospective with respect to those in country *B*, any domestic trials eventually conducted in *B* still require the retroactive enforcement of codes and punishments novel to citizens in *B*. This natural isolation of abusers limits the hope of using domestic prosecutions to communicate clearly with those living in foreign states,<sup>408</sup> particularly given the fact that a primary tool of abusive regimes is isolation of its citizens from the international human rights culture and its members.<sup>409</sup> Where leaks occur, citizens of abusive regimes must piece together inevitably diverse and conflicting interpretations of events in foreign transitions.<sup>410</sup> It is unlikely that these filtered facts and rumor-filled theories will provide a clear and coherent deterrent threat.<sup>411</sup> Thus, there is little hope that the deterrent message from a transitioning country would be felt and heard by those living elsewhere.

International authorities or a single nation acting as a global prosecutor for crimes against humanity might produce a consistent message.<sup>412</sup> It remains uncertain, however, whether residents of abusive regimes can or

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405. Wilson, *supra* note 337, at 178.

406. Mathiesen, *supra* note 332, at 228-31.

407. *Id.*; see also Wilson, *supra* note 337, at 177-81.

408. Sriram, *supra* note 297, at 394-95.

409. Aryeh Neier, *The Quest for Justice*, N.Y. Rev., Mar. 8, 2001, at 31.

410. *Id.*

411. This isolation may be fortuitous or, as Malamud-Goti argues, an essential part of an abusive regime's strategy of disarticulating power. See Malamud-Goti, *supra* note 29, at 124-28.

412. Douglass Cassel, *Why We Need the International Criminal Court*, 116 *Christian Century* 532, 533-35 (1999).



will feel the threat of these foreign prosecutions.<sup>413</sup> Mass violence and institutionalized human rights abuses are a result of the coordinated efforts of abusive regimes.<sup>414</sup> Abusers on the ground may have no clear idea about what goes on outside their borders. To the extent that they are aware, the messages sent by international prosecutions are inevitably obfuscated, if not perverted, by abusive regimes. True believers are particularly vulnerable to counterclaims on behavior made by an abusive public face of law because they are easily convinced of global conspiracies against their causes.<sup>415</sup>

Leaders who are exposed directly to international law do not present these same structural concerns. Though leaders are often true believers, they are in a position to have clear evidence that they are vulnerable to prosecution. We may hope, then, that leaders directly exposed and responsible to international law can be deterred by prosecutions of those like them.<sup>416</sup> This may be an unrealistic hope given the horrible potentials of ambition and zealotry<sup>417</sup> but at least there is structural promise of deterrence in these cases. There is little or none with respect to those living behind the veil of an abusive public face of law.

#### F. *Immediacy and the Limited Prospects of Transitional Deterrence*

Immediacy is central to the effectiveness of general deterrence strategies.<sup>418</sup> Criminals naturally discount threats of punishment that are too far in the future.<sup>419</sup> As argued above, most who commit abuses in pre-transitions are unlikely to feel the threat of punishment from international agents. For those who might feel some external threat, the threat is not immediate or definite enough to provide a significant deterrent effect given that immediately present domestic institutions support abuse through, at least, the public face of law.

True believers are unlikely to either respect or fear external threats.<sup>420</sup> Moreover, their commitments to the normative, ontological, and teleological systems that justify abuses, in combination with commitments to abusive regimes, make them comfortable with risk.<sup>421</sup> Domestic opportunists might be more vulnerable to deterrence, but they too act within the mediating threat structure of an abusive regime and are more likely to

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413. James Blount Griffin, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 Vand. J. Transnat'l L. 405, 449-53 (2001).

414. The Radio Télévision Libre de Mille Collines ("RTLM") in Rwanda provides a striking example of the role that public propaganda can play in genocide. The principals in the RTLM were convicted of genocide and incitement of genocide before the ICTR in 2003.

415. See, e.g., Gourevitch, *supra* note 17, at 210-11.

416. Cassel, *supra* note 412, at 534.

417. See Aukerman, *supra* note 4, at 68.

418. Beccaria, *supra* note 322, at 55-56.

419. Edmund S. Howe & Cynthia J. Brandau, *Additive Effects of Certainty, Severity and Celerity of Punishment on Judgments of Crime Deterrence Scale Value*, 18 J. Applied Soc. Psychol. 796, 806-09 (1988).

420. See Elster, *supra* note 336, at 36-38.

421. See *id.*

act in accordance with these immediate demands, discounting remote, vague, external, and future threats.<sup>422</sup>

Those acting under duress are even less likely to be deterred by the distant threats of outside agencies. By definition, these individuals are both risk averse and predisposed not to commit human rights abuses. They participate in the violence only because of direct and immediate danger to them or their families. Like opportunists, it is unreasonable to expect them to expose themselves to immediate harm to avoid distant and remote threats of punishment.

Immediacy is also a problem for leaders. To feel the force of any deterrent threat they must imagine that their power is limited and that their reign will end—and soon. Unfortunately, humility and a healthy sense of mortal vulnerability are not common characteristics of despots. Zealots and leaders motivated by ambition are unlikely to modify their behavior by looking toward the day when they will have fallen from power. While this concern is real enough, it is not a structural problem. The worry is essentially the same as the more general concern that criminals are hard to deter because they do not commit their crimes expecting to be caught.<sup>423</sup> In theory, then, an international enforcement regime could provide sufficient risk of punishment for leaders directly exposed to international law.

#### *G. Transitions Deter Future Domestic Abuses*

As with all policies justified by a balancing of consequences, punishment as deterrence must provide more benefit than harm.<sup>424</sup> Trials present real risks of harm to transitions and transitional goals of peace, stability, and the rule of law.<sup>425</sup> These risks are justified only if there is no less-costly way to prevent future abuses.<sup>426</sup> Trials, with the exception of trials focused on high-level leaders, do not add significantly to the deterrent effects provided by transition itself. Taking account of this balance points toward a strategy of vertically limited trials identical to that proposed in Part II of this Article.

One of the main arguments advanced in this Article is that human rights abuses on a scale that calls for transitional justice are a function of abusive cultures and systems of institutionalized violence. Absent a pervasive and institutionalized anti-Semitism, the Holocaust would not have happened.<sup>427</sup>

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422. See Aukerman, *supra* note 4, at 67; cf. Malamud-Goti, *supra* note 29, at 10-12 (pointing out that the density of social, institutional, and peer pressure is greater for underlings than for high-level leaders).

423. David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 Am. L. & Econ. Rev. 295, 308 (2002) (discussing a variety of psychological dispositions that limit the effectiveness of deterrence).

424. Jamal Benomar, *Justice After Transitions*, in *Transitional Justice*, *supra* note 25, at 32, 41.

425. See Malamud-Goti, *supra* note 29, at 4-5.

426. See Ruti Teitel, *How Are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?*, in *Transitional Justice*, *supra* note 25, at 146, 149.

427. See Goldhagen, *supra* note 17, at 27-178.

Absent widespread commitments to a "Hamitic myth," supported by public institutions, there would have been no slaughter in Rwanda.<sup>428</sup> Without a war on communism, accompanying beliefs about the pernicious communist threat, and an institutional reliance on the military there would have been no "Dirty War" in Argentina.<sup>429</sup> This suggests a simple objection to deterrence in transitions.

If large-scale human rights abuses are, in part, a function of extraordinary historical, political, legal, and cultural circumstances that create unique incentive structures,<sup>430</sup> and if transitions, by their nature, mark a shift in these conditions; then transitions may expect that there will be an accompanying shift in citizens' public behavior post-transition.<sup>431</sup> For those whose actions were a function of conditions in the past regime, shifting conditions in transition prevent future abuses by removing motivation, justification, and opportunity. Given transitional shifts in the public face of law, punishment does not provide additional benefit with respect to preventing future abuses.<sup>432</sup> This is true individually and generally.

Prompt and certain prosecutions of post-transitional bad actors will serve notice of a new regime's authority and its commitment to securing human rights. It will also heighten transitional notice, targeting deterrent threats at those who are contemplating future abuses. Retroactive punishment of pre-transitional crimes does not necessarily communicate the objective and direction of the new state's deterrent will,<sup>433</sup> nor would it be narrowly targeted to the audience most in need. Moreover, retrospective trials would draw on limited police and judicial resources, limiting the capacity of a new regime to deal with new offenses quickly and consistently.<sup>434</sup> The purposes of prospective deterrence are best served by punishing post-transitional offenses rather than reaching into the past.

Some argue that criminal review of past wrongs could make these deterrent threats more convincing.<sup>435</sup> To the extent that this is so, it does not require conducting more prosecutions than are recommended by the proposed excuse. Punishing high-level leaders would serve as sufficient demonstration of a new regime's commitment to protect rights. Selective punishment of others would serve no additional good. The better course is to focus on truth commissions and other procedures designed to capitalize on the transitional potential of former abusers.<sup>436</sup>

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428. See Gourevitch, *supra* note 17, at 47-84.

429. Malamud-Goti, *supra* note 29, at 2-70.

430. See Goldhagen, *supra* note 17, at 21.

431. See Aukerman, *supra* note 4, at 70-71 (arguing that changing personal beliefs and social norms provides better hope of preventing crime).

432. Teitel, *supra* note 16, at 146.

433. For example, these efforts, as I argued above, may be seen as arbitrary, vengeful, or purely political.

434. Ackerman, *supra* note 6, at 72; see van Zyl, *supra* note 5, at 652.

435. Minow, *supra* note 36, at 50-51.

436. Villa-Vicencio, *supra* note 377, at 209-15.

### H. *Transitions Obviate the Need for Incapacitation*

A transitional regime might justify incarceration for the practical purpose of incapacitation.<sup>437</sup> On closer examination, however, the need for incapacitation and the balance of its costs and benefits suggests limiting its application in ways similar to those of deterrence. Incapacitation faces two main objections in stable states. First, incapacitation presents a moral problem in that individuals are punished for offenses that they have not yet committed.<sup>438</sup> Second, incapacitation depends on an ability to predict accurately who is likely to commit crimes in the future.<sup>439</sup> Both these concerns are salient to transitional justice.

The first objection is primarily moral and, for a consequentialist, is not difficult to set aside. We deny innocent people their freedom because of the potential danger they pose to the public when we institute quarantines. Such policies are warranted in light of necessity and a familiar balance of harm and benefit.<sup>440</sup> Loss of freedom and compromises against fairness may be costs in the equation but are not determinative. The same is true of potential criminals. They pose a risk of harm accruing to society. In transitions they may even represent a risk of counterrevolution and a return to the oppressive ways of the past. This seems more than enough danger to justify incapacitation.

Of course, no society can put everyone in prison. To justify incapacitation there must be some way to narrow the numbers. Despite the popular concerns that incapacitation can justify imprisoning folks with an extra Y chromosome<sup>441</sup> or a history of being abused as children,<sup>442</sup> this is not what is at stake in serious jurisprudence.<sup>443</sup> Most incapacitation literature is only interested in predicting recidivism and criminal advancement.<sup>444</sup> This is no easy task and even the best models are accurate only one-third of the time.<sup>445</sup> Using these results as the basis for sentencing would mean that sixty-six percent of the resources dedicated to incapacitation strategies would have been wasted. Even if such a low average could overcome moral objections this is not an acceptable ratio in resource-starved transitional societies.

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437. See Orentlicher, *Settling Accounts*, *supra* note 2, at 2542-44.

438. *Preface: N. Morris, "'Dangerousness' and Incapacitation," in A Reader on Punishment*, *supra* note 332, at 238, 238-39.

439. *Id.*

440. See Posner, *supra* note 197, at 1214-17.

441. See Cecilee Price-Huish, *Born to Kill? "Aggression Genes" and Their Potential Impact on Sentencing and the Criminal Justice System*, 50 SMU L. Rev. 603, 621-22 (1997).

442. John Monahan, *Rethinking Risk Assessment* 100-01 (2001).

443. Although hardly serious jurisprudence, this is a popular theme in fiction. See, e.g., Philip Kerr, *A Philosophical Investigation* (1992).

444. See Jean Floud & Warren Young, *Dangerousness and Criminal Justice* (1981); John Monahan, *Predicting Violent Behavior: An Assessment of Clinical Techniques* (1981).

445. Norval Morris, *"Dangerousness" and Incapacitation*, in *A Reader on Punishment*, *supra* note 332, at 241, 246-51; see also *Barefoot v. Estelle*, 463 U.S. 880, 899 n.7 (1983).

These concerns provide a new perspective on the agency arguments from Parts II and III of this Article. Incapacitation as a justification for imprisonment is grounded in a past offense.<sup>446</sup> Most advocates of incapacitation do not see abstract risk, as a function of genetics, class, race, or environment, as sufficient to warrant imprisonment. This is, in part, due to moral concerns, but it also reflects the fact that risk predictions are nearly useless in noncriminal populations. An overt criminal act is, thus, a necessary risk factor.<sup>447</sup> Guilt is a necessary first step for justifying incapacitation.<sup>448</sup> This conclusion puts us back on the hook of earlier concerns about establishing guilt for many abusers from the past regime.

The reader might think that the above argument misses the point slightly. Former abusers, after all, have done wrong. Whether the overt act is a "crime" or not is irrelevant next to the fact that it signifies a propensity to such activities and presents a risk to the new regime. This response fails to understand the significance of public agency here and in the legality discussion above. The consequentialist, to justify incapacitation in transitions, must rely almost exclusively on past acts that were publicly accepted, and sometimes expected, as evidence that those who followed the rules in the past will break them in the future. This requires making the unwarranted assumption that former abusers will not change their behavior as the political culture and legal structure of society change. An agent-centered understanding of pre-transitional abuses should lead us to see many, if not most, former abusers as candidates for change.<sup>449</sup> Presuming, without further warrant, that they are not eligible for reform raises moral concerns that also have consequential import.

Given the fact of transition and accompanying shifts in law and public norms, it seems neither fair nor useful to assume that those who abided by the public face of law in the past will not do so in the future. Moreover, the agency focus makes the point that strategies of broad prosecution will alienate individuals who might be valuable to a transition, provided that they are not under personal threat if it succeeds.<sup>450</sup> Further, incapacitation policies run the danger of perpetuating pre-transitional divisions,<sup>451</sup> making counterrevolutions more likely,<sup>452</sup> and increasing the chances that the transition will ultimately fail to deter future crimes.<sup>453</sup>

This discussion preserves the possibility of punishing high-level leaders. Leaders have a significant personal and ideological investment in counterrevolutions. They also have the demonstrated capacity to motivate large groups of individuals to perpetrate horrific acts. Given these

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446. See generally Christopher Slobogin, *The Civilization of the Criminal Law*, 58 Vand. L. Rev. 121 (2005).

447. Wilson, *supra* note 358, 145-61.

448. *Id.*; Morris, *supra* note 445, at 247-48.

449. Villa-Vicencio, *supra* note 377, at 209.

450. *Id.*

451. Gourevitch, *supra* note 17, at 95

452. Ackerman, *supra* note 6, at 77; Malamud-Goti, *supra* note 29, at 26-27, 89.

453. Van Zyl, *supra* note 5, at 651-53.

demonstrated motives and capacities, incapacitation of leaders, through imprisonment or exile, will frequently be a justifiable transitional cost, particularly if these leaders have perpetrated overt acts during or after transition that present a direct threat to peace, stability, or the rule of law.

As a final note on this topic it is worth pointing out a distinction between the political necessities of transition and legal punishment. Though law and politics are heavily intertwined, more so in transitions, there is still a distinction. Transitions are committed to transparency when making decisions to punish.<sup>454</sup> If security is the sole justification, that should be made explicit. If it is for treasonous activity, that should be explicit. If it is simply a reflection of the transition itself, as lustration might be,<sup>455</sup> then this should be made explicit. Failure to provide public justifications runs contrary to transitional commitments to democracy and the rule of law and replicates the disarticulating use of power that defines abusive regimes.<sup>456</sup>

#### V. THE EXCUSE-CENTERED APPROACH IN CONTEXT

Transitions cannot, due to practical realities, prosecute all or even most of those implicated in widespread abuses perpetrated by and under abusive regimes.<sup>457</sup> This selectivity poses a number of threats to transitional justice programs. High among these is the hard-to-swallow fact that most of those involved in past wrongs will not be punished.<sup>458</sup> This apparent failure to assign responsibility carries with it the morally disturbing implication that those not punished are not culpable or guilty.<sup>459</sup> Failures to prosecute also present the possibility that the truth of what happened in the past will never be publicly established,<sup>460</sup> allowing abusers to carry on without consequence. Failure to establish a publicly legitimate factual account of the past also perpetuates injustices against victims by denying them the acknowledgement they deserve.<sup>461</sup> This "oblivion"<sup>462</sup> hampers efforts to identify causes and consequences of pre-transitional institutions and abuses,<sup>463</sup> limiting transitional efforts to carry out effective reform.<sup>464</sup> Without a publicly legitimate account of the past, transitions may also face revisionism, denial, and counterrevolution.<sup>465</sup>

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454. Villa-Vicencio, *supra* note 377, at 209.

455. Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 Colum. J. Transnat'l L. 357, 359 (1999).

456. Malamud-Goti, *supra* note 29, at 19-39.

457. Elster, *supra* note 21, at 208-15; Hayner, *supra* note 38, at 12; Minow, *supra* note 36, at 31, 40-47; Gutmann & Thompson, *supra* note 18, at 26-29; van Zyl, *supra* note 5, at 661, 666.

458. De Greiff, *supra* note 62, at 94-97.

459. De Greiff, *supra* note 6, at 82; De Greiff, *supra* note 62, at 94-97.

460. Hayner, *supra* note 38, at 12-14.

461. *Id.* at 28-29; Crocker, *supra* note 140, at 99, 100-01; Gutmann & Thompson, *supra* note 18, at 31.

462. De Greiff, *supra* note 62, *passim*.

463. Crocker, *supra* note 140, at 101-02.

464. Kiss, *supra* note 23, at 74-79.

465. Ackerman, *supra* note 6, at 77; Malamud-Goti, *supra* note 29, at 26-27.

These circumstances create tremendous theoretical and practical challenges for justice in transitions. This Article has sketched a solution to one of these: The need to provide guidance and justification for prosecutorial selection. While this is a valuable contribution to transitional jurisprudence it does not solve other transitional concerns, particularly those that flow from the gap between participation in abuses and prosecution for past wrongs. For example, vertically limited trials do not fully appreciate the complicity of those not prosecuted.<sup>466</sup> While they do provide a forum for establishing the truth about the past in broad strokes, prosecutions of a few top leaders do not provide public acknowledgment for most victims. Thus, they neither meet demands for truth nor do they avoid the dangers of oblivion.<sup>467</sup>

In most transitions these concerns have led to compromise programs featuring limited prosecutions that focus on top leaders, amnesties, truth commissions, and reparations.<sup>468</sup> Many European transitions have also utilized lustration.<sup>469</sup> Just as prosecutorial selections may be criticized as compromises against justice, the other elements of hybrid programs are usually seen as gap-filling strategies.<sup>470</sup> Together they seem to provide only the best approximation of justice in a very imperfect world.<sup>471</sup> This concluding part discusses how the excuse-centered approach resolves these concerns while providing guidance and justification for truth commissions.

#### A. *The Affirmative Defense Approach Guides and Justifies Prosecutorial Selection*

Structuring prosecutorial selectivity around an affirmative defense has significant advantages in the context of transitional justice specifically and transitions to democracy more generally. First, it requires substantial engagement with abusers, victims, witnesses, and society. If the burden of overcoming the defense fell on prosecutors then usual procedural protections and natural motives of defendants to avoid punishment would prevent a full hearing of the facts and circumstances.<sup>472</sup> By making the defense affirmative, transitions put the burden of revelation on defendants.<sup>473</sup> This provides individual motivation for pre-transitional bad

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466. De Greiff, *supra* note 62, at 101-06.

467. Malamud-Goti, *supra* note 29, at 18-27; De Greiff, *supra* note 6, at 81-82.

468. Rotberg, *supra* note 9, at 3.

469. Boed, *supra* note 455, at 357; Mark Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, *Law & Contemp. Probs.*, Autumn 1996, at 181.

470. Hayner, *supra* note 38, at 12-14.

471. Van Zyl, *supra* note 5, at 648.

472. Ronald C. Slye, *Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process*, in *Truth v. Justice: The Morality of Truth Commissions*, *supra* note 9, at 170, 173-77.

473. See Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in *Truth v. Justice: The Morality of Truth Commissions*, *supra* note 9, at 141, 148; Kiss, *supra* note 23, at 76-77.

actors to participate in revelatory processes such as truth commissions, dramatically enhancing the quality of the truth produced.<sup>474</sup>

Second, making the defense affirmative gives prosecutors more control over selections. Evidentiary limitations might force officials to forgo prosecutions if defendants have a presumptive defense. Affirmative defenses allow prosecutors to make principled decisions based on real information rather than allowing circumstances to force them to make blind choices or to provide de facto amnesties.<sup>475</sup> Selections made on rational evidentiary grounds also preserve scarce prosecutorial and judicial resources<sup>476</sup> while providing publicly justifiable reasons for prosecutorial selections.<sup>477</sup>

### B. *The Transitional Contributions of Truth Commissions*

Truth commissions have been integral parts of transitional justice programs in many countries.<sup>478</sup> While a discussion of these procedures is beyond the scope of this Article, some goals and aspirations of commissions are described here to explain how they can be advanced by an excuse-centered approach to transitional justice.

There are a number of truth commission models.<sup>479</sup> At base, however, all share a common conviction: That construction of a publicly legitimate and descriptively accurate account of the past is critical in transitions to democracy.<sup>480</sup> What counts as "truth" in this context varies widely.<sup>481</sup> At a minimum, truth commissions try to produce a detailed and accurate account of what happened to whom, when, and how.<sup>482</sup> Commissions also try to determine who was implicated in past wrongs,<sup>483</sup> why atrocities were committed,<sup>484</sup> and how perpetrators were able to pursue programs of

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474. Slye, *supra* note 472, at 173-77; see also Kent Greenawalt, *Amnesty's Justice*, in *Truth v. Justice: The Morality of Truth Commissions*, *supra* note 9, at 189, 190-91.

475. De Greiff, *supra* note 6, at 81-82.

476. See Carroll, *supra* note 352, at 187-89 (describing the effects on the Rwandan justice system of scarce prosecutorial and judicial resources); Huyse, *supra* note 38, at 107 (citing justice concerns relating to the use of lay officials in France after World War II where there were insufficient judicial resources).

477. De Greiff, *supra* note 6, at 81.

478. Hayner provided the first survey of contemporary truth commissions in *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 Human Rts. Q. 597 (1994). She expanded and deepened her study in *Unspeakable Truths: Confronting State Terror and Atrocity* (2001).

479. Hayner, *supra* note 38, at 32-85, 305-13.

480. *Id.* at 24-29; Rotberg, *supra* note 9, at 3; cf. *Film and Popular Memory: An Interview with Michel Foucault*, *Cahiers du Cinéma*, July-Aug. 1974, at 251-52 (Fr.), reprinted in *Radical Philosophy*, Summer 1975, at 24, 25-27 (Martin Jordin trans.) (discussing twentieth-century revolutions and transitions).

481. Hayner, *supra* note 38, at 72-85.

482. Boraine, *supra* note 473, at 151; David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 99 Ethics & Int'l Aff. 43,49 (1999).

483. Boraine, *supra* note 473, at 151; Kiss, *supra* note 23, at 70-74.

484. Bhargava, *supra* note 99, at 57-58.



destruction.<sup>485</sup> The mandate of the South African Truth and Reconciliation Committee, for example, was to “establish[] as complete a picture as possible . . . including the antecedents, circumstances, factors and context of such violations as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations.”<sup>486</sup>

The provision of a publicly acceptable account of the past serves several transitional goals. Most prominent is prevention of future abuse.<sup>487</sup> By uncovering the causes and circumstances of past abuses, transitional regimes hope to develop new social norms and public procedures that will reduce the chance of future violence.<sup>488</sup> In addition to content, then, truth commissions provide important opportunities to model procedural commitments violated under the old regime.<sup>489</sup> By publicizing accounts of the past, commissions mark a break from abusive regimes, where opacity and rarified power were essential tools of disarticulate power.<sup>490</sup> Commissions also offer recognition of victims and the wrongs they have suffered,<sup>491</sup> modeling transitional commitments to democratic principles of recognition, inclusion, and participation.<sup>492</sup>

Truth commissions count restoration and reconciliation high among their goals.<sup>493</sup> By providing opportunities for past abusers to confess and for victims to tell their stories truth commissions hope to reconcile a transitional society with its past and to set the stage for victims to be reconciled with their abusers.<sup>494</sup> Through this process of confrontation and reconciliation truth commissions aspire to establish the conditions necessary for social, political, and legal justice.<sup>495</sup> In addition, by identifying what went wrong in the past<sup>496</sup> and charting new public norms and procedures that will prevent future abuses<sup>497</sup> commissions establish and model the public commitments that form the foundation upon which a new

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485. Boraine, *supra* note 473, at 148.

486. Promotion of National Unity and Reconciliation Act 34 of 1995 s. 3(1)(a), 1 JSRSA 1-184 (2003). See generally Boraine, *supra* note 32.

487. Hayner, *supra* note 38, at 29-30; Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 Colum. Hum. Rts. L. Rev. 661, 694-97 (2004).

488. Bhargava, *supra* note 99, at 45.

489. Van Zyl, *supra* note 5, at 658.

490. Hayner, *supra* note 38, at 25.

491. Bhargava, *supra* note 99, at 54-56; De Greiff, *supra* note 6, at 93; Andre du Toit, *The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition*, in Truth v. Justice: The Morality of Truth Commissions, *supra* note 9, at 122, 135-39; van Zyl, *supra* note 5, at 658-661.

492. See Bhargava, *supra* note 99, at 50-51; Gutmann & Thompson, *supra* note 18, at 35-42.

493. See generally Kiss, *supra* note 23, *passim*; Sarkin & Daly, *supra* note 487.

494. See generally Tutu, *supra* note 23; Minow, *supra* note 14, at 235.

495. De Greiff, *supra* note 62, at 105.

496. Van Zyl, *supra* note 5, at 648.

497. Kiss, *supra* note 23, at 72.

society committed to democracy, human rights, and the rule of law can be built and sustained.<sup>498</sup>

A publicly established truth about the past can also provide some consequences for wrongdoers.<sup>499</sup> While criminal punishment is not part of the truth commission process,<sup>500</sup> publicity provides a form of public shaming.<sup>501</sup> By identifying wrongs and wrongdoers, often with the aid of dramatic victim testimony and forensic reports, truth commissions also set the stage for individuals to recognize what they have done and to assume moral accountability for the past.<sup>502</sup> This educative function of truth procedures is aided by victim participation,<sup>503</sup> providing obvious benefits for prevention and restoration.<sup>504</sup>

Civil society should play a critical role in and be a significant beneficiary of truth commissions.<sup>505</sup> South Africa provides a good example.<sup>506</sup> There, daily events were broadcast and nightly analyses conducted.<sup>507</sup> The processes of the Truth and Reconciliation Commission, as well as its daily product, were publicly accessible and were the source and topic of significant discussion and debate.<sup>508</sup> Nigeria took a similar approach.<sup>509</sup> This daily presence encourages truth seeking outside of the commission while working to prevent oblivion, denial, and revisionism. Public truth commissions also provide a model for civil society, establishing the groundwork of a transparent politics of inclusion.<sup>510</sup>

These varied goals require that commissions regard "truth" as multifaceted.<sup>511</sup> A primary benefit of commissions, as compared to criminal trials,<sup>512</sup> is a freedom from rules of evidence and other procedural limitations on testimony, including rights against self-incrimination and limitations on hearsay evidence.<sup>513</sup> Truth commissions can afford these looser protocols because they cannot, by definition, result in individualized

498. Gutmann & Thompson, *supra* note 18, at 35-42.

499. Dumisa B. Ntsebeza, *The Uses of Truth Commissions: Lessons for the World, in Truth v. Justice: The Morality of Truth Commissions*, *supra* note 9, at 158, 163-65; van Zyl, *supra* note 5, at 662.

500. Kiss, *supra* note 23, at 79 (citing Desmond Tutu's introduction to the final report of South Africa's Truth and Reconciliation Commission ("TRC")).

501. Ntsebeza, *supra* note 499, at 163-65; van Zyl, *supra* note 5, at 662-63; *see also* Douglas N. Husak, *Already Punished Enough*, 18 Phil. Topics 79 (1990).

502. Kiss, *supra* note 23, at 74-79.

503. Van Zyl, *supra* note 5, at 647-58.

504. *Id.*

505. Hayner, *supra* note 38, at 234-39; Crocker, *supra* note 140, at 109-14; du Toit, *supra* note 491, at 129.

506. Rotberg, *supra* note 9, at 13.

507. *See* van Zyl, *supra* note 5, at 653-56.

508. Crocker, *supra* note 140, at 113.

509. Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 Colum. J. Transnat'l L. 89, 140-41 (2001).

510. *See* du Toit, *supra* note 491, at 124-26.

511. Gutmann & Thompson, *supra* note 18, at 33-42; *see* van Zyl, *supra* note 5, at 667.

512. Aukerman, *supra* note 4, at 74-75.

513. *See generally* Levinson, *supra* note 105.

criminal sanctions.<sup>514</sup> Truth commissions provide plenty of room for normative evaluation, however. Assessment of right and wrong is critical to acknowledging what happened, recognizing the suffering of victims, and striking a contrast between past and future.<sup>515</sup> The latitude afforded to truth commissions also provides the opportunity to hear from a wide variety of sources, including victims, witnesses, and abusers.<sup>516</sup> Further, testimony can take the form of narratives of personal experience.<sup>517</sup> This flexibility expands the scope of truth while offering recognition to those whose stories were suppressed and ignored.<sup>518</sup>

Commissions need not produce a final decision or reflect a perfect consensus.<sup>519</sup> Given the broad scope of commissions, consensus may well be impossible.<sup>520</sup> A consensus truth might also fail to capture the complexity of the past.<sup>521</sup> This is not a disadvantage. Destruction of diverse opinion is, after all, a hallmark of abusive regimes.<sup>522</sup> Forcing commissions to pursue a consensus view is, in this light, radically undemocratic.<sup>523</sup> What truth commissions can do is provide a shared experience of pursuit and, by conducting themselves in the light of transitional commitments to human rights and the rule of law, create a shared “universe of comprehensibility” of the past.<sup>524</sup>

Finally, truth commissions seek to define new social, political, and individual normative identities. Anthony Duff and Jean Hampton, among others, have argued that trials play an important role in society by expressing and reaffirming social and legal commitments.<sup>525</sup> For these theorists the process of trial and punishment is a process of re-presenting social norms and expressing approbation and condemnation. Truth commissions have the same potential, though their orientation is prospective and aspirational rather than retrospective.<sup>526</sup>

### *C. An Excuse-Centered Approach Justifies and Organizes Truth Commissions*

The excuse-centered approach to transitional justice proposed here provides important structural guidance and motivational support for truth commissions. It also advances the goals and opportunities of truth

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514. Aukerman, *supra* note 4, at 49. *But see* Hayner, *supra* note 38, at 107-09, 127-32.

515. Hayner, *supra* note 38, at 29-30.

516. Minow, *supra* note 14, at 239; van Zyl, *supra* note 5, at 657.

517. Boraine, *supra* note 473, at 152; Kiss, *supra* note 23, at 70.

518. Kiss, *supra* note 23, at 72-74; Minow, *supra* note 14, at 239.

519. Gutmann & Thompson, *supra* note 18, at 32, 35-42.

520. *Id.* at 34-35.

521. *Id.*

522. Malamud-Goti, *supra* note 29, at 72-83.

523. Gutmann & Thompson, *supra* note 18, at 32-33.

524. Kader Asmal et al., *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance* 46 (1996).

525. Duff, *supra* note 164, at 124-26; Hampton, *supra* note 68, at 208.

526. Ackerman, *supra* note 6, at 70-79; De Greiff, *supra* note 62, at 95.

commissions while avoiding the most pernicious objections to these procedures and the amnesties they imply.

Within the rule of law embraced by transitions, prosecutors carry the burden of proof.<sup>527</sup> Affirmative defenses represent an exception to this rule. Defendants who assert an affirmative defense must prove the elements of the proposed defense.<sup>528</sup> Truth commissions are ideal forums for developing the record needed to make these selections, particularly if those who seek to avoid prosecution must testify about what happened, what they did, and why.<sup>529</sup> They cannot be taken at their word, of course. Commissioners must investigate these accounts by hearing additional testimony and by examining relevant evidence.<sup>530</sup> After the investigation is complete, commissioners operating within the excuse-centered approach would make recommendations to prosecutors, who have final authority to act based on their independent judgment.<sup>531</sup>

A model of transitional justice that requires testimony at a truth commission as a prerequisite for securing immunity from prosecution may seem to create motivational<sup>532</sup> and, perhaps, due process problems.<sup>533</sup> These concerns are easily salved by "use immunity" and "derivative use-immunity" arrangements.<sup>534</sup> Within these agreements, prosecutors may not use information learned from compelled testimony to prosecute their case against the accused.<sup>535</sup>

This excuse-centered structure enhances significantly the truth-seeking potential of commissions. Because commissioners cannot produce a verdict, their recommendations to prosecutors are not binding, and the evidence they produce is not accessible for prosecutions, commissions are free of the constraints and pressures of evidentiary rules and due process protections. This freedom from constraints allows commissions to develop

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527. *In re Winship*, 397 U.S. 358, 362-63 (1970).

528. *Patterson v. New York*, 432 U.S. 197, 202 (1977).

529. This is similar to the requirement for amnesty imposed by South Africa's TRC. See Boraine, *supra* note 473, at 148-49 (describing former President F.W. de Klerk's appearance before the TRC); Ntsebeza, *supra* note 499, at 163-64; Slye, *supra* note 472, at 173-77; van Zyl, *supra* note 5, at 653-56 (providing an overview of the TRC).

530. See van Zyl, *supra* note 5, at 655 ("If the crime was a gross violation of human rights, the Amnesty Committee had to conduct a public hearing before granting amnesty.").

531. This approach is similar to that adopted by the TRC in South Africa, *see id.* at 653-56, and by the Committee for Reception, Truth, and Reconciliation in East Timor. Comm. for Reception, Truth, and Reconciliation in East Timor, *On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, §§ 24, 32-33, 38, 40, UNTAET/REG/2001/10 (July 13, 2001).

532. With perjury and contempt, self-incrimination forms what Justice Arthur J. Goldberg has called the "cruel trilemma." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964).

533. South Africa's Truth and Reconciliation Committee recognized this concern and acknowledged that it was sacrificing strict due process protections in favor of truth. *See* 1 Truth and Reconciliation Commission of South Africa Report, *supra* note 63, at 174-200 (describing legal challenges to the TRC).

534. *See, e.g.*, Tribunals of Inquiry Act (1990) Cap. 447, § 8 (Nigeria).

535. *Kastigar v. United States*, 406 U.S. 441 (1972) (holding that use and derivative use immunity are coextensive with the Fifth Amendment right against self-incrimination).

more detailed and complete accounts of the past than would be possible in a criminal trial.<sup>536</sup> Rather than establishing what truth they can within procedural constraints, commissioners can, and should, concentrate on developing an extensive and detailed account of what happened, who was involved, and why. These open procedures produce accounts of the past that are broader, deeper, more detailed, more accessible, more acceptable, and more legitimate in the public eye than would be possible in trials.<sup>537</sup>

Unlike criminal trials, truth commissions organized for the purpose of making prosecutorial selections provide a compelling motivational structure that supports truth seeking.<sup>538</sup> First, by virtue of the formal separation between commissions and trials, nothing a former abuser says in a truth commission procedure can be used against him. Second, where admitting crimes in a criminal trial brings the promise of punishment, admitting abuses before a truth commission offers hope of security from prosecution. Third, abusers know that lies and omissions may leave them vulnerable to future prosecution.<sup>539</sup> Finally, because testimony cannot be used to prosecute others, witnesses, including both victims and abusers, need not fear reprisals. Truth commissions, unlike criminal trials, do not limit the form of victims' testimony, nor are victims subjected to aggressive cross-examination.<sup>540</sup> Instead, victims tell their stories in their own ways, allowing a moment of public acknowledgment denied by oppressive regimes and by trials, where the focus is on the defendant and his rights.<sup>541</sup>

This, then, is the outline of how the excuse-centered approach would function procedurally within a broader transitional justice program. Open truth commission procedures, protected by use-immunity safeguards, would provide a forum for developing a full account of the past. As the process goes along commissioners make recommendations to prosecutors regarding who should and should not benefit from the proposed affirmative excuse. Prosecutors would make the final decision. Any bargains accepted by prosecutors would ultimately be subject to revocation if later discoveries revealed that an abuser had withheld significant facts about his past bad acts.<sup>542</sup> Alternatively, if officials decide to prosecute an abuser based on or despite the recommendations of commissioners, then they would not be allowed to make investigative or prosecutorial use of testimony or evidence presented to a commission.

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536. Rotberg, *supra* note 9, at 13 (noting that amnesty, not freedom from constraints, allows a more complete account of the period before transition).

537. De Greiff, *supra* note 62, at 105 ("The history [of the former regime] should describe not only the fate of the victims, but also the institutional aspects of repression, and, specially, its sources of support."); Gutmann & Thompson, *supra* note 18, at 32-42.

538. Gutmann & Thompson, *supra* note 18, at 26-27; Kiss, *supra* note 23, at 76-77.

539. The Truth and Reconciliation Commission imposed this rule. See Kiss, *supra* note 23, at 76.

540. See Kamali, *supra* note 509, at 140-41 (noting that the adversarial structure of the Nigerian truth commission severely diminished its reliability).

541. See du Toit, *supra* note 491, at 122.

542. Cf. Kiss, *supra* note 23, at 76 (noting denial of amnesty to perpetrators who failed to fully disclose their actions).

D. *An Excuse-Centered Approach Resolves Dilemmas of Truth Commissions*

Truth commissions propose a “trade-off” between justice as either criminal punishment or truth.<sup>543</sup> To minimize what is lost in this trade-off, advocates for commissions have developed jurisprudential theories designed to satisfy the call for justice in transitions.<sup>544</sup> Professors Amy Gutmann and Dennis Thompson argue that these theories must satisfy three minimal demands.<sup>545</sup> First, commissions must appeal to a moral principle that is at least comparable to the moral principle of punishment sacrificed in the trade-off.<sup>546</sup> Second, commissions, to reflect commitments to democracy, human rights, and the rule of law, and to maximize the public legitimacy of the truth they produce, must be inclusive and broad in spectrum, providing an opportunity for recognition and participation to as many individuals as possible, including both victims and abusers.<sup>547</sup> Third, commissions must develop morally rich practices that reflect their principled goals but also provide a model for democratic and rule of law procedures going forward.<sup>548</sup> The second and third requirements are simple design challenges. The more difficult task is to provide a morally satisfying justification for the “trade-off.” Theories of “restorative justice” have emerged as the most common response.<sup>549</sup>

The central insight of restorative justice in the transitional context is that pre-transitional abuses are symptoms of social and political pathologies. Liberal revolutions represent breaks with the past. Restorative procedures provide a path to the future by laying the groundwork for social, political, and legal change.<sup>550</sup> In addition, they seek to produce shifts in public institutions and the public and private consciousnesses of citizens.<sup>551</sup> The ultimate goal, of course, is to reconcile a transitional society with its past and to reconcile victims with their abusers in order to prepare the ground for a stable society dedicated to democracy, human rights, and the rule of law.<sup>552</sup>

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543. Gutmann & Thompson, *supra* note 18, at 22-24.

544. Kiss, *supra* note 23, at 68. This effort has been aided by recent contributions from traditional criminal theory circles. *See, e.g.*, Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (2002); *Restorative Justice and the Law* (Lone Walgrave ed., 2002). Restorative justice presents numerous promises and problems, a full discussion of which must wait for a later time.

545. Gutmann & Thompson, *supra* note 18, at 22-23.

546. *Id.* at 23, 27.

547. *Id.* at 23.

548. *Id.* at 23-24.

549. *See* Asmal et al., *supra* note 524, at 12-27; 1 Truth and Reconciliation Commission of South Africa Report, *supra* note 63, 103-34; Tutu, *supra* note 23, *passim*; Kiss, *supra* note 23, at 68-69; Llewellyn, *supra* note 23, at 96-111.

550. *See* Sarkin & Daly, *supra* note 487, at 697-700; van Zyl, *supra* note 5, at 667.

551. Minow, *supra* note 14, at 243-45 (discussing the effects on private consciousness).

552. *See id.* at 250-52 (discussing reconciliation efforts of the TRC); van Zyl, *supra* note 5, at 667.

Criminal punishment represents, in the restorative justice scheme, both a failure to appreciate the unique features of past abuses and a practical threat to the success of transition.<sup>553</sup> So viewed, broad programs of prosecution conflict, theoretically and practically, with transitional demands to restore or create the conditions necessary to ensure the success of a new regime.<sup>554</sup> Given this conflict, restorative justice advocates argue that establishment of a stable post-transitional society provides a moral imperative that trumps obligations to punish.<sup>555</sup>

In place of punishment, restorative justice seeks to restore or create the social conditions necessary to ensure the success of transition.<sup>556</sup> Truth commissions, by focusing on admission and contrition<sup>557</sup> rather than adversarial prosecution and punishment, better reflect the demands of restorative justice.<sup>558</sup> In addition, if commissions conduct their business carefully, they can construct a foundation for transitional commitments to human rights and the rule of law and provide a model for democratic procedures.<sup>559</sup> These goals, along with more purely practical demands bound up with resource allocation and stability,<sup>560</sup> justify the truth-for-justice trade-off.

The restorative rationale for truth commissions presents serious concerns. While a full discussion of these is beyond the scope of this Article, it is enough for now to recognize that even these hopeful theories must live with sighs of resignation lurking in the background.<sup>561</sup> Whether truth commissions mean to fill in the gaps or to provide an exclusive alternative to trials, theorists and practitioners admit that something is being given up.<sup>562</sup> Public admission and even public shame are not what most think about when they call for punishing abusers.<sup>563</sup> Solace taken from restorative justice theories is just that. Truth commissions retain the damning label “best possible approximation [of justice].”<sup>564</sup>

Truth commissions conducted within an excuse-centered approach need not wither in this darkness. Suggestions that commissions involve a trade-

553. See Aukerman, *supra* note 4, at 66.

554. See generally Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 Int'l Legal Persp. 73 (2002).

555. See Minow, *supra* note 36, at 91-92; Tutu, *supra* note 23.

556. See generally Tutu, *supra* note 23; Kiss, *supra* note 23, at 68.

557. Neither contrition nor forgiveness can be forced, of course, and the success of commissions should be contingent on neither. See Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* 80, 149 (1988) (discussing forgiveness, resentment, and hatred, and the retributive idea); Minow, *supra* note 14, at 249.

558. See Kiss, *supra* note 23, at 79-83.

559. Gutmann & Thompson, *supra* note 18, at 35-42 (discussing democratic reciprocity and the economy of moral disagreement).

560. Van Zyl, *supra* note 5, at 648-53 (discussing the practical constraints that transitions face).

561. Gutmann & Thompson, *supra* note 18, at 22-26 (discussing the “moral burden” of truth commissions).

562. Rotberg, *supra* note 9, at 7.

563. Gutmann & Thompson, *supra* note 18, at 25.

564. Rosenfeld, *supra* note 12, at 310 (alteration in original).

off are only sensible if one assumes that those offered amnesty should be punished, but, due to circumstances, cannot be. Within the excuse-centered approach those implicated in past wrongs are invited to participate in truth-seeking procedures, along with victims, witnesses, and other relevant sources, to determine what justice demands. Provision of an excuse within this model is, by definition, in accord with the demands of justice. Thus, truth commissions conducted in service of an excuse-centered approach do not trade truth for justice; they elicit truth in the service of justice. Provision of an excuse does not imply an exchange of punishment for truth because those who qualify for the affirmative excuse should not be punished.

None of this discussion minimizes the significant benefits to transitions that truth commissions may bring in terms of restoration and other important goals. The point is that from within an excuse-centered approach these goals do not provide primary justification for truth commissions. Rather, the excuse-centered approach serves criminal justice needs first. Commissions are justified for their service to prosecutorial selection. This is what justifies their place in a transitional justice program.

This brief discussion does not claim to address sufficiently all of the intriguing issues raised by truth commissions in the context of transitional justice. It is meant only to present some of the most significant concerns to explain how an affirmative excuse-centered approach can provide structural and theoretical support for commissions. It also points out some of the features that commissions, conducted at the service of prosecutorial selections, must have. While further discussion of the issues raised in this section would be well worth the time spent, it is beyond the narrow scope of this Article. The present purpose is only to provide a schematic account of the role that truth commissions play in a transitional-justice strategy guided by the proposed affirmative defense.

### CONCLUSION

This Article has defended the proposition that most of those implicated in wrongs committed by and under abusive regimes should not be subject to criminal prosecution. It has argued that the prevailing social, legal, and political conditions characteristic of abusive regimes provide good reason to excuse those who acted consistently with an abusive public face of law. Provision of this excuse does not deny that those implicated in pre-transitional abuses have done wrong. They certainly have. Consistent with this fact, the excuse preserves room for assignments of moral and political guilt.<sup>565</sup>

None of this discussion makes past events disappear. Clarifying the standing of law and public agents in transitions does not meet all transitional justice requirements. It does, however, provide a better picture

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565. Jaspers, *supra* note 192, at 112-17 (discussing the way of purification in post-Hitler Germany).



of what a full transitional justice program might look like. First, it will be centered on extending and developing transitional reforms committed to democracy, the rule of law, and human rights.<sup>566</sup> Second, the process must provide for the constructive participation of all those affected by these changes, including those who claim the legality defense.<sup>567</sup> Third, transitional justice programs must provide opportunities for citizens to transition into their new public roles.<sup>568</sup> Public agents are candidates for change just as are public norms. They should be recognized as participants in the process.<sup>569</sup>

Truth commissions, as part of the excuse-centered approach, fit the unique conditions of transitions. Transitions must justify and establish new public norms.<sup>570</sup> This implies adopting a coordinative orientation<sup>571</sup> to most involved in events of the past while retaining the goal of social expression that is central to both the justification and application of public law.<sup>572</sup> By putting a priority on establishing facts while acknowledging that most participants in past events cannot be held criminally liable truth commissions reflect this premium on coordination.

Transitions are not wholly coordinative enterprises, of course. As in functioning democracies, there are coercive outcomes. Those who disagree with changes in public consciousness and norms cannot opt for the old ways. There is another aspect to the focus on public agency that comes to the fore here. Even Kant, perhaps the staunchest of the legal deontologists, understood that law has an instrumental character.<sup>573</sup> In and after transitions the mark of public agency provides for the possibility that those who acted in accord with the public face of law in the past will do the same when the law changes. At least, absent compelling evidence to the contrary, a transitional regime should assume that they will.

The provision of an affirmative defense for most pre-transitional bad actors also preserves the possibility of reparations for victims of the past regime.<sup>574</sup> "Responsibility" is a notoriously difficult word. One use of

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566. Ackerman, *supra* note 6, at 5-24 (providing a taxonomy of revolutions); Teitel, *supra* note 16, at 215-19 (discussing a paradigm for transitional justice and transitional jurisprudence).

567. Gutmann & Thompson, *supra* note 18, at 35-38 (discussing democratic reciprocity).

568. Van Zyl, *supra* note 5, at 666-67 ("[Commissions] generate a process of national introspection that requires everyone . . . [to] examine their role in the conflicts of the past.").

569. Slye, *supra* note 472, at 173-77.

570. De Greiff, *supra* note 62, at 105.

571. Gutmann & Thompson, *supra* note 18, at 38-42 (discussing the economy of moral disagreement).

572. Duff, *supra* note 164, at 124-26, 235-45.

573. See Kant, *supra* note 283, at \*232-33.

574. This discussion of reparations is meant only as a sketch. A full defense of reparations would require much more. See Thomas McCarthy, *Vergangenheitsbewältigung in the USA: On the Politics of the Memory of Slavery*, 30 Pol. Theory 623 (2002) (discussing reparations); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689 (2003) (same); Thomas McCarthy, Remarks on the Morality and Politics of Reparations for Slavery (Oct. 28, 2005), available at <http://www.yale.edu/glc/justice/mccarthy.pdf> (discussing moral guilt).

responsibility is found in criminal law. "Responsible" can also have a moral dimension, suggesting an act of free will for which the actor is held to blame.<sup>575</sup> It can also have a political dimension.<sup>576</sup> Finally, "responsibility" can have a looser meaning, more prominent in some branches of tort law, that relies on cause as a key feature generating responsibility to repair.<sup>577</sup> Forgoing criminal blame does not release individuals from responsibility for contributing to the success and stability of the new regime. First, though abusers may not be punished, they are still morally culpable for their acts.<sup>578</sup> Second, recognizing that many agents of harm in the past regime were acting according to the demands placed on them in their public roles suggests that responsibility for many pre-transitional abuses falls also on the society that made them possible.<sup>579</sup> Corresponding assignments of moral and political guilt provide ample justification for reparations.<sup>580</sup> Individual duties to repair will vary, of course. Citizens may bear a higher tax burden to pay for social programs that benefit victims.<sup>581</sup> Corporations and states that realized gains by colluding with an abusive regime may be required to return ill-gotten profits and to contribute to reform and reparation programs.<sup>582</sup> Others may be called upon to return land or other property appropriated under the eye of the old guard.<sup>583</sup> What is important, however, is that these duties flow not from criminal liability but from a recognition that abuses of the past would

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575. See Jaspers, *supra* note 192, at 25-26, 57-64.

576. Van Zyl, *supra* note 5, at 667.

577. The famous example of the ship's captain, provided by Hart in his postscript to *Punishment and Responsibility*, captures much of the spectrum:

As captain of the ship, X was responsible for the safety of his passengers and crew. But on his last voyage he got drunk every night and was responsible for the loss of the ship with all aboard. It was rumored that he was insane, but the doctors considered that he was responsible for his actions. Throughout the voyage he behaved quite irresponsibly and various incidents in his career showed that he was not a responsible person. He always maintained that the exceptional winter storms were responsible for the loss of the ship, but in the legal proceedings brought against him he was found criminally responsible for his negligent conduct, and in separate civil proceedings he was held legally responsible for the loss of life and property. He is still alive and he is morally responsible for the deaths of many women and children.

Hart, *supra* note 198, at 211 (internal quotation omitted).

578. See Jaspers, *supra* note 192, at 57-64; Kiss, *supra* note 23, at 76.

579. Jaspers, *supra* note 192, at 69-75; Bhargava, *supra* note 99, at 60-63; Kiss, *supra* note 23, at 78.

580. I leave a full account of how this is so to another day.

581. This has been a part of reparations programs in the United States, proposed and actual. See, e.g., 50 U.S.C. app. § 1989b (2000); Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. Pa. L. Rev. 677 (1999); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 Tul. L. Rev. 597 (1993); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. Rev. 477 (1998).

582. Rosenfeld, *supra* note 12, at 324-27 (dismissing the case for "some" restitution).

583. Ben Hlatshwayo, *Land Expropriation Laws in Zimbabwe and Their Compatibility with International Legal Norms*, 11 Zimb. L. Rev. 41 (1993). But see Jeremy Waldron, *Superseding Historic Injustice*, 103 Ethics 2 (1992).

not have occurred but for the complicity of an abusive society, its members, and enablers.

As a practical matter, the excuse-centered approach advanced here does not suggest radical changes to transitional justice practice. Due to the unique circumstances that define transitional justice most transitional regimes adopt hybrid strategies that look much like the program recommended here. What the excuse-centered approach offers is justification and guidance for what otherwise are ad hoc strategies that appear to involve significant compromises against justice. By providing a detailed excuse and defending its elements against common concerns that circulate through transitional justice debates this Article has attempted to provide practical as well as theoretical guidance for practitioners faced with the unique challenges of seeking justice in transitions.

## *Notes & Observations*